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No. _____

In The

Supreme Court of the United States

October Term, 1990

RANDY HASKETT,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the penalty verdict coerced in violation of due process and the Eighth Amendment's requirement of non-arbitrary, reliably obtained death sentences, by the singling out of the lone pro-life juror during penalty deliberations, after the jury had declared itself deadlocked, and by the coercive questioning of that juror in the presence of the victim's family, and under the other circumstances of this case?

2. Did the mid-deliberation instructions, which the state supreme court found "precluded the jury from using insanity as a mitigating factor," violate the Eighth Amendment, where, at least one juror had based a vote for life on insanity, supported by evidence in the record?

3. Did the pattern of improper argument by the prosecutor, designed to undermine the integrity of defense counsel, combined with the prosecutor's improper statement of the law regarding his inability to offer other evidence he (implied) he had of Petitioner's bad character, violate due process and the Eighth Amendment?

4. Did the erroneous introduction of defendant's unreliable, coerced confession to a defense psychiatrist deprive Petitioner of a fair penalty trial?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, RANDY HASKETT, respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of the State of California, affirming his judgment of conviction, and sentence of death.

OPINION BELOW

The opinion of the Supreme Court of California, including three dissenting opinions, is published in the official reports of the state of California at 52 California Reports, Third Series, page 210[1], and is reproduced in

[1] The name and official citation of the case is *People v. Haskett*, 52 Cal.3d 210 (1990).

the Appendix. The order of the California Supreme Court denying a Petition for Rehearing, in which three justices were of the opinion rehearing should be granted is also appended.[2]

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(3). The judgment below was rendered on December 20, 1990, affirming petitioner's conviction and sentence of death. The Honorable Justice Sandra Day O'Connor granted Petitioner's application to extend time to file this petition to June 20, 1991.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth, Sixth, Eighth and (§ 1 of the) Fourteenth Amendments to the United States Constitution and (Former) §§ 190.1-190.4 of the California Penal Code are set forth in full in the Appendix.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner was prosecuted under California's 1977 death penalty law,[3] for the attempted second degree murder of his half-sister, and the first degree murder of her

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[2] In the proceeding below Randy Haskett, petitioner herein, appeared as defendant and appellant; the People of the State of California appeared as plaintiff and respondent.

[3] Former California Penal Code §§ 190.1-190.4. (App. 3-12)

two young sons. A special circumstance allegation of multiple murder was found true, and Petitioner was sentenced to death. On appeal, the conviction was affirmed, but the California Supreme Court reversed the penalty judgment.[4]

On retrial of the penalty phase, Petitioner was again sentenced to death on a jury verdict.

1. Coercion of Verdict Issue

During deliberations, the jury sent several notes to the Court. On the third day of deliberations the jury asked what the result was if there was a split jury. The court responded that it would cause a mistrial and the jury would be discharged. That afternoon further evidence of disagreement came in the form of a note asking if the jurors were permitted to "cross-examine" one another. On the morning of the fourth day the bailiff reported trouble in the jury room and concern that jurors were in a confrontation, and later that morning the jury declared itself hopelessly deadlocked. The trial judge then asked the jury several questions clearly implying that she wanted the jury to reach a verdict. After returning the jury to the jury deliberation room, later that afternoon, the jury asked a series of questions, which reflected further discord among the jurors, and which singled out "one juror" as a problem to the reaching of a verdict. The trial judge answered some of the questions, and instructed the jury in response, that defendant was presumed to be sane, and that the jury could not use

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[4] The opinion reversing the prior penalty judgment is reported in *People v. Haskett*, 30 Cal.3d 841 (1982).

insanity as a mitigating factor. On day six, the jury sent another note saying one juror was doing what the judge said they could not do. On motion of the prosecutor, and over petitioner's objection, the court then held a hearing into the alleged refusal of a juror to follow instructions regarding the use of insanity as a mitigating factor. In open court, in the presence of the father of the child victims, Mr. Rose[5], the judge inquired if any juror was refusing to obey her instructions. When no juror volunteered, the Judge asked the foreman to identify the offending juror, and the foreman did so. That juror, Roy Lizana was ordered to remain while the other eleven jurors were excused for lunch. Still in open court, the trial judge questioned Lizana whether he was refusing to obey her instructions by using insanity as a mitigating factor against her explicit instructions. He said he was not, and was excused. The father of the child victims in this case then followed Juror Lizana into the courthouse elevator. When defense counsel approached the elevator, Mr. Rose stepped out. After lunch, the judge again questioned Mr. Lizana "just to be sure" and reenforced her instructions that mitigation must not be based on insanity in this case. A short time later, the jury returned a death verdict.

Petitioner argued that the verdict of death was coerced in this case because the jury was hopelessly deadlocked, was exhorted to reach a verdict, was misinformed that the prior death sentence was essentially

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[5] The Victim's family has been present during the entire trial and sat near the prosecutor and jury. Petitioner moved to exclude them from the hearing into juror misconduct, but the objection was overruled.

proper, but reversed for mere "legal error," was misinformed that if they did not reach verdict a mistrial would be declared,[6] was instructed to disregard the only factor that any juror was using to base a finding of mitigation and a vote for life,[7] and finally, the lone, hold out juror voting for life was accused by the other jurors of misconduct, singled out, in open court as the offending juror, questioned as a possible offender in open court in the presence of the victims' relatives, subjected to a direct contact with the victims' father, re-questioned in open court, and then returned to deliberate. The California Supreme Court ruled that the verdict was not coerced. It held the trial judge had the right to inquire into possible juror misconduct, and taking each of the above factors separately, ruled each was not error, and so not coercive.[8]

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[6] Under applicable state law (former California Penal Code § 190.4, subdivision (b)) (See App. 11), where the penalty jury is deadlocked, the defendant was entitled to a life without parole sentence.

[7] There was evidence that the murders of the two young boys (ages 4 and 11 years old) were committed in a flurry of stab wounds, which were indicative that a mental disorder was operating at the time of the crimes. Also, the killing of children was dramatically inconsistent with Petitioner's un-rebutted evidence of his fondness for and loving interaction with children. The California Supreme Court rejected the state's argument that there was no evidence of mental problems: "In the instant case, the jury could appropriately consider the nature of the wounds as a circumstance of the crime, as an indication of extreme mental or emotional disturbance . . . " (App. 29, fn. 5, last ¶)

[8] App. 43-46.

2. Erroneous Withdrawal of Insanity as a Mitigating Factor

Petitioner also argued the judge's mid-deliberation instructions to the jury that they could not consider insanity as a mitigating factor, and that Petitioner was conclusively presumed to be sane violated the Eighth Amendment as this Court has construed it in the line of cases following *Lockett v. Ohio*, 435 U.S. 586 (1978). The California Supreme Court wrote:

> "We agree that the court's instruction on the presumption of sanity effectively precluded the jury from considering insanity as a mitigating factor."[9]
>
> * * *
>
> "In California, insanity cannot be proved at the trial on the issue of guilt. The defense is raised by a separate plea and decided in a separate trial. (See [Penal Code] § 1026, subd. (a).) Defendant did not place his sanity at issue; as a result, at the guilt trial he was 'conclusively presumed' sane, and evidence tending to prove insanity was inadmissible. (*People v. Wells* (1949) 33 Cal. 2d 330, 350.) * * * California's . . . statutorily enumerated mitigating factor which deals with impairment due to mental disease or defect is not the *Drew* definition of insanity, missing an important word, 'substantial,' and obviously contemplating a lesser impairment of ability to appreciate criminality of conduct.[8]
>
> "[8] Significantly, the United States Supreme Court, considering the validity of the Ohio statute in *Lockett v. Ohio, supra*, 438 U.S. 586, and *Bell v. Ohio, supra*, 438 U.S. 637, was not concerned that one of the

[9] App. 31, fn. 7.

> listed mitigating factor (sic) *excluded* evidence of insanity; 'The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.' (Ohio Rev. Code Ann. § 2929.04(B) (1975).) The high court was, however, concerned that the listed mitigating factor did not provide for consideration of lesser states of mental deficiency." (App. 33-34)

The opinion of the California Supreme Court allows a trial court to exclude evidence of insanity during a penalty phase, and to instruct a penalty jury that the defendant is presumed sane and insanity cannot form the basis of a vote for life.

3. Prosecutorial misconduct during argument to jury

During his summation to the jury, the prosecutor, who had been held to have committed misconduct in the prior penalty argument by the State Supreme Court[10], made twenty-two remarks in the nature of a personal attack on defense counsel and his tactics in the case. Although he was twice admonished by the trial judge, the attacks did not subside. In addition, the prosecutor misstated the state law to the jury during his closing argument, by telling them that while the defense was permitted to introduce evidence of Petitioner's good character, he was not legally permitted to rebut that with evidence of bad character, and implying that he was aware of such evidence but did not produce it because he was not allowed to.[11] As to these two areas of

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[10] *People v. Haskett, supra,* 30 Cal.3d 841, 864-867

[11] Defense counsel argued that if there were bad character evidence to be presented, the prosecutor would have produced it. To respond, the District Attorney argued:

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prosecutorial misconduct the California Supreme court perfunctorily found they were not prejudicial.[12]

4. Confession issue

Among the evidence presented at the retrial was the testimony of Dr. John Stahlberg, a court appointed psychiatrist who's testimony had been offered by the defendant in the previous trial. During cross-examination of Stahlberg in the prior trial, he testified that petitioner confessed his guilt of the crimes to him. Prior to the retrial on penalty, Petitioner moved to exclude evidence of that confession, on the grounds, *inter alia*, that it was coerced, and that its introduction violated the psychotherapist-patient privilege. On appeal, Petitioner argued that the statement was inadmissible at the penalty retrial because his attorney-client privilege, with respect to the statement, had never been waived, and was not waived by calling Dr. Stahlberg to the stand during the prior trial to testify to his mental state and intelligence level.[13] He

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> "[T]he law says the people can bring in evidence only of presence or absence of use of force or violence in criminal activity. . . . So do you think I can bring in evidence of someone to say, well no he's a bad guy?"

Although the trial court sustained Petitioner's objection to this argument, and admonished the prosecutor, he also argued he could not "bring in another person with whom he [petitioner] may or may not have had a bad reputation . . . That's the law. In other words, I'm very limited, contrary to what counsel would like you to believe otherwise."

[12] App. 55, 57.

[13] He testified that petitioner was mildly retarded and capable of rehabilitation.

also argued that the confession was inherently unreliable, due to Dr. Stahlberg's testimony that he believed it was the product of coercive questioning, and was therefore inadmissible under this Court's pronouncements that death verdicts must not be obtained as the result of unreliable evidence or procedures. The California Supreme Court ruled that the privilege was waived by Petitioner when he failed to object to the cross-examination of Dr. Stahlberg during the prior trial[14] and that the statement was neither involuntary within the meaning of the Fifth Amendment because there was no state action, nor was it involuntary within the due process clause because there was no impermissible police activity. (citing *Colorado v. Connelly*, 479 U.S. 157 (1986)). The court below did not directly address the question of the reliability of the statement or its inadmissibility, if unreliable, under the Eighth Amendment.[15]

REASONS FOR GRANTING THE WRIT

Petitioner urges this Court to grant certiorari in order to prevent the state of California from executing him after an unconstitutional penalty trial. Certiorari should be granted to review the federal constitutional errors of the state Supreme Court, which, in a sharply divided opinion, affirmed a death sentence despite its acknowledgement of prosecutorial misconduct in arguing the penalty. The court also acknowledged that there was evidence

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[14] App. 51-52.

[15] App. 52-53.

from which Juror Lizana could properly conclude petitioner was suffering an extreme mental or emotional defect, but was then instructed not to use insanity as a mitigating factor because the defendant was presumed sane. In these circumstances, considering all of the other pressures on that juror who clearly changed his vote from life to death, the cause of the change must be viewed as a form of coercion that offends the due process right to a fair trial, the right to a jury trial and a unanimous verdict, and the Eighth Amendment right not to be sentenced to death by unreliable or unfair procedures.

In particular: the writ should be granted because: (1) The verdict of death was coerced; (2) After at least one juror based a vote for life on an inference of insanity drawn from the evidence, the trial judge instructed the jury Petitioner was presumed sane, and that insanity must not be used as a mitigating factor; (3) Improper arguments of the prosecutor in the form of repeated personal and professional attacks upon defense counsel, combined with misstatements of the law regarding additional prosecution evidence, violated due process and deprived Petitioner of a fair penalty trial; (4) The introduction of Petitioner's confession to a defense, court appointed psychiatrist which was inadmissible and unreliable because factually coerced, violated the right to counsel and the Eighth Amendment principle that a sentence of death must not be based on inherently unreliable evidence.

1. The Penalty Verdict Was Coerced

This Court has said that "any criminal defendant, and especially any capital defendant being tried by a jury

is entitled to the uncoerced verdict of that body." *Lowenfield v. Phelps*, 484 U.S. 231 (1988). To determine if a judge's charge to the jury is coercive, it must be reviewed "in its context and under all the circumstances." *Jenkins v. United States*, 380 U.S. 445 (1965).

In this case, numerous circumstances combined to create a coercive atmosphere, or to make jurors more susceptible to pressure to reach a verdict.[16] Among them were: (1) The jurors were informed that they were to sit on a retrial of the case and that the prior death verdict had been reversed for "legal errors."[17] (2) When the jury declared that it was "hopelessly deadlocked" the trial judge asked them if there was "anything she could do to assist them in reaching any kind of a verdict."[18] (3) After

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[16] The opinion below did not fully recite the facts Petitioner relied upon in this regard, and despite Petitioner's suggestion, in his Petition for rehearing, the incomplete and erroneous discussion of the facts was not corrected.

[17] Petitioner did not assign this as an error, but considers it to be a factor which contributed to the coercion of the verdict, because it had a tendency to diminish the juror's sense of personal responsibility for the sentence they decided upon. (Cf. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Telling the jury another jury had already (a) reached a verdict in this case and (b) had reached a death verdict would have a tendency to make it easier for them to do so. It also would (c) inform them that even their verdict might be reversed for such errors.

[18] This remark, in context, clearly implied to the jurors that the trial Judge wanted them to reach a verdict, notwithstanding their statement, in writing, that they were hopelessly deadlocked. This type of "expression of frustration by the court or jurors about the inability to reach a verdict" was noted as a factor supporting a finding of coercion in *United States v. Beattie*, 613 F.2d 762 (9th Cir.) and *United States v. Bonam*, 772 F.2d 1449, 1451 (9th Cir. 1985).

hearing the evidence of the very emotional nature of the tragic murders in this case,[19] and seeing how difficult this second trial was for the surviving victim,[20] the jury asked a question: "What happens if we have a split jury?" and the court told them the jury would be discharged and a mistrial declared;[21] (4) The relatives of the victim, identified with the prosecution, and sat near the District Attorney and the jury throughout the proceedings.[22] (5) The

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[19] The murder victims were two young boys, 4 and 11 years old who were killed while their mother lay bleeding, but conscious nearby, after being stabbed repeatedly. Their mother, Gwendolyn Rose, testified at the retrial of the penalty phase, in a very emotional session. Her husband, the boys father, Mr. Rose also testified.

[20] She wept while on the witness stand, and bared her chest to reveal a mass of scars resulting from the stab wounds. She also told how, after being attacked herself, she heard her sons lured with a toy truck, from the closet where they were hiding, only to be savagely stabbed over and over again.

[21] This was, technically, not true. Under California law applicable to this case, if the jury is "unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and impose a punishment of confinement in state prison for life without possibility of parole." (Former California Penal Code § 190.4, subdivision (b), 2d ¶.)

More importantly, it had a likelihood to worry jurors that if they could not reach a verdict, there would be a third trial, which would require the surviving victim, Mrs. Rose, and the father of the dead boys, Mr. Rose, to publicly relive the horrifying events, yet again.

[22] Of course there is not error in this, which is a relatively common occurrence. However, facing the victims has an undeniable effect on jurors deciding a life and death question those victims have a great personal stake in. Here, this factor is relevant and important on the issue of coercion because of

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judge returned the jurors to deliberate after they declared they were hopelessly deadlocked; (6) There were numerous signs that the jury was in disagreement thereafter;[23] (7) On the sixth day of deliberations, two days after the declaration of a deadlock, the jury sent the judge a note showing that one juror was refusing to vote for death, and that, in the opinion of the other eleven, he was doing so against the judge's instructions regarding insanity and other mental mitigation.[24] (8) The Court expressed its concurrence with the majority's frustration with the one juror, by conducting a hearing, in open court, and in the presence of Mr. Rose, into the allegations against that one juror.[25] When that failed, the judge

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what happened when juror Lizana was singled out. At least one court has recognized the potential for coercion where the victim's family is a physically present factor in a capital trial. In *Fuselier v. State*, 468 So.2d 45 (Miss. 1985) the Court reversed a death penalty in part because the victim's daughter was permitted to sit at counsel table with the prosecutor. The Court said this was likely to raise the sympathies of the jury and lead to a verdict of death based on that sympathy.

[23] The jury's notes, which are all quoted in the opinion below, (App. at pp. 20-24), revealed that majority jurors wanted to cross-examine minority jurors, and further showed a growing polarization between the life and death jurors. In addition, the bailiff reported to the trial judge that an altercation was occurring in the jury room which nearly came to blows.

[24] Quoted at App. 39, this question showed that the majority of jurors were frustrated with their inability to reach a verdict (cf. fn. 18, *Supra.*), and that they were trying to pressure the one juror they believed to be offending the judge's instructions.

[25] First, the judge asked the jurors, assembled as a group, if any of them was refusing to follow her instructions. No one answered.

expressed her belief in the truth of the allegations in the note, and asked the foreperson to identify the offending juror.[26] (9) The lone juror voting for life, Juror number two, Roy Lizana, was then identified in open court.[27] (10) After excusing the other eleven jurors, the trial judge then questioned Lizana in open court about whether he was following her instructions not to use insanity as mitigation or a basis for voting for life.[28] (11) After this

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[26] This had the effect on that juror, and the other jurors present, of implying that the Judge disbelieved him when he failed to admit he was the one during the general questioning of the assembled jury. It also had the effect of identifying Juror Lizana as *"the problem"* (in the words of the trial judge), in the presence of Mr. Rose, who Lizana knew was present.

[27] The state Supreme Court said it was impossible to tell if this was a lone hold out juror, or one of several. But this conclusion is belied by: (a) the fact that the jury's note mentioned "one juror"; (b) the fact that the jury bothered to write such a note, which they would not do if there were several jurors voting for life on several theories; (c) the fact that the prosecutor identified this juror as the problem as shown by his attempts to have this juror removed from the jury; (d) the fact that the judge, herself, said: " . . . if he were hanging up a jury because his sole reason is that he will not follow the court's instructions on a particular point, then I might go into it further. But if he has other reasons on which he is basing his disagreement, . . . " This strongly implies that the trial judge believed, as every participant in the trial did, that Juror Lizana was "hanging up the jury." (e) Finally, the judge referred to this juror in the following way: "he seems like a very nice – really not the person I expected to be the problem . . . " This also, clearly implies that the Court felt juror Lizana was "the problem" standing in the way of a verdict.

[28] The removal of the other jurors left them believing that the judge agreed they had correctly identified a problem, and allowed them to speculate about what the judge might say. It

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round of questioning, Juror Lizana went to the elevator, and Mr. Rose followed him into the elevator. When defense counsel approached, Mr. Rose stepped out of the elevator, and the elevator left.[29] (12) After the noon break, although she had previously denied the prosecutor's request to cross-examine Lizana before lunch, the Judge again placed him in the position of being questioned about his deliberations, "just to be sure."[30] (13) Defense counsel objected to the identification of, and singling out for questioning of Juror Lizana, both before and after the noon break.[31] (14) After that questioning, the jury

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left Mr. Lizana alone in the jury box, the sole focus of what had become a mid-deliberation inquisition. The mere fact that a juror was individually questioned after a deadlock was disclosed to the judge has been called coercive and violative of a fair trial, in *United States v. Salvador*, 740 F.2d 752, 755 (9th Cir. 1984). And, in *Cornell v. State of Iowa*, 628 F.2d 1044, 1048 (8th Cir. 1980) the Court, said, relying on *Brasfield v. United States*, 272 U.S. 448 (1926) that "an intrusive inquiry is not to be sanctioned."

[29] This approach, had an obvious potential for intimidation, and resulted directly from singling Mr. Lizana out as the reason the jury had not yet decided to put the man that killed Mr. Rose's children to death.

[30] The judge would not allow cross-examination, but did so herself, which had the potential of being far more coercive.

[31] Petitioner contends the presence of an objection at the time by those on the scene is just as strong evidence that the procedure appeared to be coercive, as the absence of such an objection is that it did not. Please see discussion of this factor in *Lowenfield v. Phelps, supra*, 484 U.S. 231, 240, quoting *Amos v. United States*, 496 F.2d 1269, 1273 (8th Cir.) with approval.

resumed its deliberations, and after 4 hours and 12 minutes more of deliberations, returned a verdict of death.[32]

Essentially, Juror Lizana was questioned by the judge under the circumstances set out above, solely because one juror alleged that another refused to follow the judge's instructions. Inquiry into this type of allegation, after the verdict, was the subject of a deletion by congress of legislation that would have permitted courts to inquire into the internal workings of juries. Discussing that deletion, Justice O'Connor wrote:

> " . . . This deletion would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations, for example, where a juror alleged that the jury refused to follow the judge's instructions . . . " *Tanner v. United States*, ___ U.S. ___, 97 L.Ed.2d, 107 S.Ct. 2739 (1987).

In the present case, the Judge's inquiry had the effect of directing Juror Lizana, who was voting for life, not to do so, on the basis of the one theory he was using. In the circumstances of this case, this colloquy with the judge had the effect of directing Juror Lizana to joint the other eleven and vote for death. It was tantamount to directing a verdict of death by the one juror who was voting for life. This clearly violates due process. (*Brotherhood of Carpenters v. United States*, 330 U.S. 396, 408 (1947), accord *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977), *Bollenbach v. United States*, 326 U.S. 607, 615 (1946).)

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[32] The relatively short time between the coercive interrogation of the pro-life juror and the verdict suggests a possibility of coercion of the verdict. (*United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978); *Lowenfield v. Phelps, supra*, 484 U.S. 231, 241.

Moreover, all of the factors in this case support a finding that the procedure, was coercive. The judge knew that the majority of jurors favored death. (Compare *Locks v. Sumner*, 703 F.2d 403, 406 (9th Cir. 1983), *United States v. Bonam, supra*, 772 F.2d 1449, 1451, and *United States v. Beattie, supra*, 613 F.2d 762, 766). And, a single juror was identified, and coerced into changing his view. (See *United States v. Abkar*, 698 F.2d 378, (9th Cir. 1983), Kennedy, J. concurring; *United States v. Robinson*, 560 F.2d 507, 517 (2d Cir. 1977).) A death sentence resulting from such coercion deprived Petitioner of a fair trial, of the individual judgment of each juror, and of a reliable determination of the penalty, in violation of due process, his right to a jury trial and in derogation of the Eighth Amendment. This Court is urged to hold that singling out a lone or minority juror and discussing the reasons for his or her minority or hold out vote, as here, after the direction of the split is revealed and after the jury has declared that it is deadlocked, is reversible constitutional error that applies to the states through the Fourteenth Amendment. (See this Court's supervisory holding along similar lines in *Brasfield v. United States, supra*, 272 U.S. 448 and see *United States v. Sae-chua*, 725 F.2d 530, 532 (9th Cir. 1984) where the circuit court held a charge to the entire jury was coercive where, as a result of the jury's note and the judge's polling of the jury, the hold out juror would be aware that the judge knew the vote was 11-1, and that the majority stood for conviction. It has even been suggested that merely identifying the hold out juror would have the effect of "leading her to yield rather than adhere to her views." *United States v. Robinson, supra*, 560 F.2d 507, 517. Under the circumstances of this case, there is no credible

doubt that the verdict of juror Lizana was the product of coercion.

2. Withdrawal of insanity as a mitigating factor violated the Eighth Amendment

During deliberations, the penalty jury asked the trial judge "whether [they] could consider insanity based on the act of repeated stabbings of the victim."

Over Petitioner's objection, the judge replied:

> "The defendant is presumed sane. The jurors cannot consider insanity as a mitigating factor."[33]

The California Supreme Court ruled that there was evidence in this case on which the jurors could base a finding that the crime was committed while Petitioner was suffering from extreme mental or emotional disturbance.

> "In the instant case, the jury could appropriately consider the nature of the wounds as a circumstance of the crime, as an indication of extreme mental or emotional disturbance, or under the "catchall" factor, as a circumstance which extenuates the gravity of the crime or pertains to any aspect of the defendant's character or record" [Italics added][34]

Petitioner argued below that an inference of insanity was supported since this cruel killing of two small children was especially out of character for a person who, according to the evidence, had a great love for children, and cared for children often. The trial judge not only told

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[33] App. 24.

[34] App. 29, fn. 5.

the jury Petitioner was presumed sane, she also instructed that insanity was "something . . . I indicated there was no evidence of." The Court below acknowledged:

> "We agree that the court's instruction on the presumption of sanity effectively precluded the jury from considering insanity as a mitigating factor."[35]

The trial court never defined "insanity" for the jury, or informed them of the legal definition of insanity in California law.[36] The jury never, collectively, or individually distinguished between legal insanity and any other form of mental problems which any juror might be inferring from the stab wounds.

It is, therefore, reasonable to conclude that the jury used a common sense meaning of the term, rather than a technical medical, or legal one.[37]

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[35] App. 31, fn. 7.

[36] The Court below assumed the jury understood the difference between legal insanity and the type of "extreme mental or emotional disturbance" the evidence would support based on two aspects of the record. The first was an earlier jury note which read: "Some of us feel there is not a willingness among some of the jurors to discuss the case and go by the evidence that has been presented. They are trying to speculate on evidence not presented. There is a doubt in their minds about the sanity of Randy Haskett, which has not been presented in this case." From this note, the majority of the Court below concluded: the jury "recognized that defendant's sanity was not in issue in the case."

[37] Webster's Encyclopedic Unabridged Dictionary of the English Language defines "insane" as "not of sound mind; mentally deranged" and includes: "demented, lunatic, crazed, crazy, maniacal, foolish and irrational" as synonyms. As one synonym for "insanity" it lists "aberration." A juror who had not been instructed in the technical, legal definition of insanity

(Continued on following page)

It is also particularly important to note that the jury itself injected the concept of insanity into the penalty proceedings, after, apparently, one or more of them believed it was shown by the stab wounds.

For this reason, this court is urged to reject the analysis of the California Supreme Court on this point, which turns on the legal definition of insanity.[38] Essentially, the court below held insanity is a legal defense to guilt, so it is conclusively presumed to be absent after guilt is determined. Further, evidence of it is inadmissible. Petitioner contends this ruling runs afoul of this Court's decision in *Penry v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934, at 2949.[39] Even if the state supreme Court is correct that Petitioner

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(Continued from previous page)

under California law, might easily conclude, on this record that the crime here was an "aberration", and thus the product of "insanity," or might have adopted an ordinary meaning of that term and reasonably felt that it applied to the facts of this case.

[38] The court below held that in California a defendant is presumed sane if he or she is convicted and has not raised insanity as a legal defense to guilt. "[A]s a result", the Court's reasoning continued "at the guilt trial he was 'conclusively presumed' sane, and evidence tending to prove insanity was inadmissible." App. 33.

[39] "Penry's mental retardation was relevant to the question whether he was capable of acting 'deliberately' [an element of the special penalty determinative questions under the Texas statute] but it also 'had relevance to [his] moral culpability beyond the scope of the special verdict question[n].' *Franklin [v. Lynaugh]*, 487 U.S. at ___, 108 S.Ct. at 2332, 101 L.Ed.2d 155 (1988) * * * [New ¶] A rational juror at the penalty phase of the trial could have concluded . . . , that Penry was less morally culpable than defendants who have no such excuse."

was precluded from raising a legal defense of insanity at the penalty phase, the same mental state was a proper basis for a juror to use to find Petitioner was "less morally culpable" than a person without such excuse.

The ruling that evidence tending to prove insanity was legally inadmissible is also tantamount to the analysis rejected by this Court in its recent decision in *McCoy v. North Carolina*, ___ U.S. ___, 110 U.S. 1227 (1990). In *McCoy*, this Court rejected a similar argument from the state. There, the North Carolina Supreme Court ruled that mitigating evidence became legally irrelevant if it was not found to be true by all twelve jurors. But the state may not rule, as a matter of law, that evidence which a juror could reasonably use as mitigating, is irrelevant, and therefore may not be considered. Nor can a trial judge instruct jurors that "there is no evidence" of a mitigating factor merely because no similar legal defense to guilt was raised in a prior phase of the case.

> "The state court's holding distorts the concept of relevance.
>
> "[O]ur holdings in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), and *Eddings v. Oklahoma, supra*, show that the mere declaration that evidence is 'legally irrelevant' cannot bar the consideration of that evidence if the sentencer could reasonably find that it warrants a sentence less than death." 110 S.Ct. at 1232.

The majority below also found the "presumption of sanity" instruction in this penalty case was not error, because insanity is not a *statutory* mitigating factor.

> "Although California's statute enumerating potential mitigating factors in capital cases includes one that permits consideration of evidence of impairment due to mental disease or

> defect . . . that factor clearly contemplates a mental state less than insanity."[40]

The glaring, logical error in this reasoning[41] is two-fold: (1) If a mental state less than insanity is mitigating, insanity, itself which includes that lesser mental state, *must be mitigating, ipso facto,* and (2) the status of insanity as a *non-statutory mitigating factor* does not justify telling the jury "there was no evidence of" it as the judge told Juror Lizana, or that "this may not be considered as a mitigating factor." Rather, this type of mitigating evidence and this type of non-statutory mitigating factor appears to be precisely what a jury deciding penalty must not be precluded from using under this Court's decisions in *Lockett v. Ohio, supra,* 435 U.S. 586, and its progeny. As this Court held in *Mills v. Maryland,* 486 U.S. 367 (1988), it would violate the Eighth Amendment's prohibition against arbitrariness in punishment, "to allow or require the imposition of the death penalty" where the sentencer "is precluded from considering, as a mitigating factor, any aspect of the defendant's character or record or any of the circumstances of the offense." And "[T]hat the corollary that the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence, is equally well established."[42]

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[40] App. 33.

[41] The state Supreme court's conclusion in this regard was, apparently, the product of a very strange reading of this Court's decision in *Bell v. Ohio,* 438 U.S. 637 (1978). Please see fn. 8 of the opinion below. App. 34.

[42] Relying on *Lockett, supra, Skipper v. South Carolina,* 475 U.S. 1 (1968), and *Eddings v. Oklahoma,* 455 U.S. 104 (1982).

Writing for the Court, Chief Justice Rhenquist has acknowledged that "defendants who commit acts attributable to . . . emotional and mental problems, may be less culpable than defendants who have no such excuse." (*Boyde v. California*, ___ U.S. ___, 110 S.Ct. 1190, 1198-1199; See also, *Penry v. Lynaugh, supra*, 109 S.Ct. 2934, [holding the absence of instruction allowing jurors to *give effect to* evidence of defendant's mental retardation and abused background as mitigating evidence violates the 8th amendment because it deprived the jurors of a vehicle for expressing its reasoned moral response to mitigating evidence in reaching a decision on the sentence to be imposed.])

Evidence that defendant acted very differently during the commission of the crime, than he usually acted can easily be seen to justify an inference that the crime was the product of insanity,[43] and to reduce the moral culpability of the crime.

> "Importantly, for example, it may suggest that the conduct of which the defendant stands convicted was not in keeping with his or her usual qualities or traits, a fact that has as much relevance to culpability as to future dangerousness." *Franklin v. Lynaugh* (1988) ___ U.S. ___, 108 S.Ct. 2320, at 2336 (Justice Stevens dissenting).

This observation is particularly *apropos* in this case, where the jury heard evidence that appellant loved children and babysat frequently, that he was even tempered, and was told that the crime in this case was not the act of a "normal" person. In this case, the evidence the Juror

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[43] As one or more of the jurors may have used the term.

Lizana focused on as suggesting that appellant was "insane" at the time of the crime was evidence that he was not "himself", or at least not the person his friends and relatives described in their testimony at the time of the crime. It cannot be said, as a matter of law, that there was *no evidence* "worthy of consideration" on the subject of insanity in this case, and since it cannot, the judge's remarks that "there was no evidence of" insanity require reversal of the death sentence, because it is reasonably probable that one or more jurors understood that the judge precluded them voting for life based on insanity, as they understood that term.

3. Unfair remarks in the prosecutor's argument deprived Petitioner of a fair trial.

Although the Court below dismissed the argument with short shrift, and unfair reading of the briefing[44], Petitioner carefully demonstrated below that the prosecutor engaged in a systematic pattern of improper argument.

This same prosecutor tried Petitioner's first trial and although the Supreme Court affirmed the guilt verdict, that Court disapprovingly described his misconduct in the former penalty trial.

On this retrial, the prosecutor attacked the motives, credibility and integrity of the defense attorney. He said:

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[44] In the opinion below, the Court erroneously stated that Petitioner did not cite to the record in assigning certain remarks of the trial prosecutor as error. This is simply wrong. Each of the remarks attributed to the prosecutor was supported by an appropriate citation to the record, although, in some cases those citations appeared in the "Statement of Facts" portion of his briefs.

1) that defense counsel did not want the jurors to follow the law – which favored the death penalty in this case; 2) the defense was engaged in theatrics; said the defense attorneys had a "scheme"; 3) referred to the defense's "whole plot"; 4) said the defense counsel was "superb" at "trickery . . . What an actor . . . painting a false picture of the defendant."; 5) accused him of blasphemy, "I felt that [defense counsel] was almost taking God's name in vain."; 6) told the jury the defense was telling them "not to follow" and not to "consider the law."; to "Forget about the law. Don't follow the law, set it aside."; 7) said that defense counsel "misstated the evidence . . . a tricky question . . . the question, in and of itself, very tricky."; 8) said defense counsel "might trick some juror . . . very, very shrewd."; 9) said it was very misleading for counsel to say the jury "has full discretion of doing so. That is really misleading . . . trying to get you off the track of considering the law and imposing the proper verdict."; 10) Asked, "Do any of you think he deserves life under the law that the defense attorney doesn't want you to follow . . . "; 11) Asked: " . . . is this misleading you. Of course it is. Why would [defense counsel] want to mislead you?"; 12) Accused him of misleading the jury because " . . . he would like you to think he has extra evidence to show the defendant is innocent."; 13) Attacked the "credibility of [defense counsel]"; 14) said "Counsel also misstated the law when he said the law says you have to . . . look at circumstantial evidence carefully. That is not true at all."; arguing: "If he can get you to do that . . . to get you to vote for a penalty that is not justice in this case . . . the only just penalty is, in fact death, under the law, that [defense counsel] does not want you to follow or consider."; 15) Argued: "No

defense witness [or defense counsel] cares about dead children."; 16) Accused: "That's a complete misstatement of the evidence to mislead each and every one of you. That's terrible. That's absolutely terrible."; 17) Asked: "Or is it just another smoke screen, a ploy that counsel will use to try to mislead you on false evidence?"; and finally, 18) repeated: "So, that is exactly why you can see that [defense] counsel does not want you to consider the law."

As a compliment to this barrage of character assassination lodged against defense counsel, the prosecutor misstated the law regarding his right to present bad character evidence about Petitioner to rebut the evidence that he was a good and trusted person who loved and cared for children. Under California law, the prosecutor was entitled to rebut any evidence offered by the defendant at the penalty phase,[45] but the District Attorney told the jury:

> "The law says the people can bring in evidence only of presence or absence of use of force or violence in criminal activity. [new ¶] . . . [S]o do you think I can bring in evidence of someone to say, well no he's a bad guy?"

In combination, these acts of impropriety by the prosecutor were likely to have contributed to the verdict, in view of the nature of the defense theory presented here, and in light of the jury questions in this case.

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[45] "Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation." [excerpt], Former California Penal Code § 190.3 (App. 8), construed by the California Supreme Court to allow evidence of the kind mentioned here, in *People v. Boyd*, 38 Cal.3d 762, 776 (1985).

Essentially, the prosecutor questioned the defense evidence that the crime was out of character for defendant, and that he was a usually good person who loved children. In light of the jury's questions, discussed at length above, regarding whether the defendant may be viewed as suffering from some mental problem in light of the flurry of stab wounds inflicted on the child victims, it seems clear that any improper weakening of the force and effect of the defense evidence of prior good character would be prejudicial under a *Chapman*[46] or any test. Since the arguments here had a tendency to undermine Petitioner's main defense, and since they had a tendency to undermine the reliability of the resulting verdict, the death sentence must be set aside as violative of due process and the Eighth Amendment (Please see *Drake v. Kemp*, 762 F.2d 1449, 1461, fn. 16 (11th Cir. 1985); *Wilson v. Kemp*, 777 F.2d 621, 624-628 (11th Cir. 1985); *Caldwell v. Mississippi, supra*, 472 U.S. 320.)

4. Petitioner's penalty trial was infected with highly prejudicial inherently unreliable evidence of a confession to a defense expert.

The confession introduced by the prosecution at the retrial of the penalty phase in this case was coerced by the defense psychiatrist. He (Dr. Stahlberg) so testified, and the People did not contest the fact. Petitioner was threatened by the doctor and told he would be sentenced to death if he did not tell the truth, which the doctor made clear to Petitioner, meant admitting he was guilty.

The path for this confession getting into evidence in the retrial of the penalty phase was circuitous at best. It

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[46] *Chapman v. California*, 386 U.S. 18, 24 (1967)

was a statement made to a defense confidential psychotherapist before the first trial. At that trial, the expert was called by defense counsel during the penalty phase, but he did not testify that Petitioner was not guilty, only that he was mildly retarded and could be rehabilitated. Without objection of former counsel, the prosecutor was allowed to elicit the confession on cross-examination of Dr. Stahlberg. After the judgement of death was reversed in Petitioner's prior appeal by the state Supreme Court, the People then offered the confession in rebuttal on the retrial of the penalty phase, which is the subject of this Petition.

The confession should not have been admitted in evidence on the retrial of penalty because: (1) Petitioner did not call Dr. Stahlberg in that re-trial; (2) His former counsel's failure to object to cross-examination outside the proper scope of direct, and Dr. Stahlberg's failure to assert the attorney-client privilege, and Petitioner's silence, should not be deemed to be a waiver of the attorney-client privilege, which is an aspect of the right to counsel[47]; and regardless of (1) or (2), the evidence presented established that the confession was unreliable and it should have been excluded because unreliable evidence should never form the state's basis for obtaining a verdict or sentence of death under this Court's reasoning in *Caldwell v. Mississippi, supra.*

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[47] This would be the equivalent of finding a waiver from silence, and would be offensive to notions of basic fairness. Certainly, there was no knowing and intelligent consent to the use of this confession in some later trial. *Johnson v. Zerbst,* 304 U.S. 458 (1938)

The confession, usually a guilt-related item of evidence, was highly prejudicial in this case because it had a tendency to deprive defense counsel and defendant of any credibility in the penalty phase.

Essentially, Petitioner's penalty theory was that he should not be sentenced to death because he was not guilty, and the crime was out of character for him to commit.[48]

Under California law applicable to this case, a proper penalty argument is to rely upon lingering doubt about guilt.[49] Erroneous introduction of an unreliable confession of the accused clearly had the effect of removing any residual doubt defense counsel may have been able to raise by good character evidence.

As a consequence, this Court should issue its writ to void the unconstitutional death sentence that resulted.

WHEREFORE, Petitioner prays that this Honorable Court grant his petition and issue its Writ of Certiorari.

Respectfully submitted this 20th day of June, 1991.

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[48] A highly dubious choice for defense counsel, but the one that was made, nonetheless.

[49] The California Supreme court so stated in the opinion reversing the prior death sentence in this case. Please see 30 Cal.3d at p. 866.

ORDER DENYING REHEARING
Crim 24649 - S004694

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

PEOPLE, Respondent

v.

RANDY HASKETT, Appellant

FILED FEB 20 1991

Appellant's petition for rehearing DENIED.

Mosk, J., Broussard, J. and Kennard, J. are of the opinion the petition should be granted.

/s/ Lucas
Chief Justice

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

1977 Statute

Former California Penal Code.

§ 190.1. Death penalty; determination of guilt; special circumstances; further proceedings

A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2, except for a special circumstance charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of

the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Sections 190.3 and 190.4.

§ 190.2. Death penalty or life imprisonment without parole; special circumstances

The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found, in a proceeding under Section 190.4, to be true:

(a) The murder was intentional and was carried out pursuant to agreement by the person who committed the murder to accept valuable consideration for the act of murder from any person other than the victim;

(b) The defendant, with the intent to cause death, physically aided or committed such act or acts causing

death, and the murder was willful, deliberate, and premeditated, and was perpetrated by means of a destructive device or explosive;

(c) The defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death and any of the following additional circumstances exists:

(1) The victim is a peace officer as defined in Section 830.1, subdivision (a) or (b) of Section 830.2, subdivision (a) or (b) of Section 830.3, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

(2) The murder was willful, deliberate and premeditated; the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding; and the killing was not committed during the commission or attempted commission of the crime to which he was a witness.

(3) The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of any of the following crimes:

(i) Robbery, in violation of Section 211;

(ii) Kidnapping in violation of Section 207 or 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute

a violation of Section 209 within the meaning of this paragraph.

(iii) Rape by force or violence in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261;

(iv) The performance of lewd or lascivious acts upon the person of a child under the age of 14 years in violation of Section 288;

(v) Burglary in violation of subdivision (1) of Section 460 of an inhabited dwelling house with an intent to commit grand or petit larceny or rape.

(4) The murder was willful, deliberate, and premeditated, and involved the infliction of torture. For purposes of this section, torture requires proof of an intent to inflict extreme and prolonged pain.

(5) The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder in the first or second degree.

(d) For the purposes of subdivision (c), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim.

§ 190.3. Death penalty or life imprisonment; determination by trier; evidence of aggravating and mitigating circumstances; factors

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code, or Sections 37, 128, 219 or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, is no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and was acquitted. The restriction on the use of this evidence is intended to apply only to

proceedings conducted pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time, as determined by the court, prior to the trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

In determining the penalty the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(e) Whether or not the offense was committed under circumstances which the defendant reasonably

believed to be a moral justification or extenuation for his conduct.

(f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the effects of intoxication.

(h) The age of the defendant at the time of the crime.

(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole.

§ 190.4. Special circumstances; special findings; penalty hearing; application for modification

(a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact

shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of the separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and impose a punishment of confinement in state prison for life.

(b) If defendant was convicted by the court sitting without a jury, the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and impose a punishment of confinement in state prison for life without possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subjected to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be

alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subjected to the death penalty, evidence presented at any prior phase of the trial, including any proceeding upon a plea of not guilty by reason of insanity pursuant to Section 1026, shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(c) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to subdivision (7) of Section 1181. In ruling on the application the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in section 190.3, and shall make an independent determination as to whether the weight of the evidence supports the jury's findings and verdicts. He shall state on the record the reason for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes.

COPY

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RANDY HASKETT, Defendant and Appellant.	)	S004694/ Crim. 24649 (Super. Ct. No. A614862) FILED DEC 20 1990

Defendant Randy Haskett appeals from the sentence of death imposed on retrial after this court reversed the penalty judgment in *People v. Haskett* (1982) 30 Cal.3d 841 (*Haskett I*). A jury had convicted defendant of attempted second degree murder of his half-sister, Gwendolyn R., and of the first degree murders of her two sons, Keith, age 11, and Cameron, age 4. (Pen. Code, §§ 664/187, 187.)[1] The jury had found true a multiple-murder special-circumstance allegation (former § 190.2, subd. (c)(5)) and imposed the death penalty under the 1977 statute. (See former § 190.1 et seq.; Stats. 1977, ch. 316, §§ 7-13, pp. 1257-1262.) We affirmed the guilt and special circumstance findings but reversed the sentence of death for *Ramos* error. (*People v. Ramos* (1982) 30 Cal.3d 553.) On retrial a jury has again imposed the death penalty. This appeal is automatic. (§ 1239, subd. (b); former § 190.4, subd. (e).)

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[1] Hereafter statutory references are to the Penal Code unless otherwise indicated.

I.

The prosecution introduced evidence that had been presented at the first trial – both testimonial and physical – tending to show the circumstances of the killings of the two boys and the physical and sexual attack on their mother. The prosecution also introduced evidence of a prior but unrelated sexual attack and beating. In defense, defendant called a number of alibi and character witnesses. The prosecution produced several witnesses in rebuttal, including a psychiatrist to whom defendant had confessed his guilt.

Prosecution Evidence. The prosecution evidence relating to guilt may be fairly summarized by reference to this court's summary of the facts in *Haskett I* (*supra*, 30 Cal.3d at pp. 847-848):

"On October 23, 1978, defendant was arrested and charged with rape, robbery, and attempted murder of his half-sister, Mrs. Gwendolyn [R.], and with the first degree murder of her two sons, Keith and Cameron. The key witness for the prosecution was Mrs. [Gwendolyn R.], who testified in substance as follows.

"In the morning hours of October 23, Mrs. [Gwendolyn R.] was awakened when her 11-year-old son Keith returned home after spending the weekend with his grandmother. Her husband had already left for work, but she remained in bed, where her four-year-old son Cameron was also sleeping. Shortly after Keith's arrival, she was awakened again, this time by defendant, who had already entered the house and was apparently in the

living room. He identified himself as Randy, and she recognized his voice. He asked her to help him start his car, which he claimed had a dead battery. She responded from the bedroom that she could not help him because she had no cables, but invited him to make himself at home and prepare something to eat.

"A few moments later she heard Keith shout that defendant had cut him. She rushed to the living room, where she saw defendant wielding a kitchen knife and observed blood on her son's hand. Defendant then grabbed her hand and told her not to speak or move. He put the children in the bedroom closet, then demanded that Mrs. [Gwendolyn R.] engage in sex with him. Out of fear, she agreed to capitulate to his sexual demands if he would put the knife down. He did so, but after intercourse he picked it up again and told her he needed money. Again because she was frightened, she emptied her purse on the bed and gave him the contents, slightly over $30. He handed her a pillow case or towel and told her to wipe all the surfaces in the room that he may have touched. After she had finished, he choked, kicked, and repeatedly stabbed her until she sank to the floor motionless. He covered her with a bedspread and went to the closet. Opening the door, he coaxed the boys out, then killed them both by repeated stabbing.

"To corroborate Mrs. [Gwendolyn R.'s] testimony, the prosecution offered several photographs of the corpses and of Mrs. [Gwendolyn R.'s] wounds, the testimony of police officers that they discovered $30 in the pocket of a shirt lying under the covers of defendant's bed, several items of blood-stained clothing found in defendant's washing machine and elsewhere at his residence, [and]

the testimony of a sheriff's office criminalist that there was evidence of semen in Mrs. [Gwendolyn R.'s] vagina shortly after the assault."

As a potential aggravating factor, the prosecution presented evidence of an alleged sexual assault and beating of Mrs. Toni R. in 1977. On the morning of October 7 Mrs. Toni R. went to the mail box a few yards from her apartment door. As she reentered, defendant, who had apparently slipped inside, pulled a sweatshirt over her head and pushed her to the floor. Defendant forced the woman into a bedroom and began to undress. Mrs. Toni R., who was eight months pregnant, became nauseous. Defendant demanded oral sex; the woman protested to all of his demands: "I'm not having sexual relations with my husband, and eight months pregnant at this point, and I'm certainly not going to have it with you." Defendant then grabbed Mrs. Toni R., forcibly took her to the bathroom, wet her hands, rubbed them with soap and, using her hand, massaged his penis. When defendant ordered the woman to undress, she stood up, started praying out loud, and then attempted to escape. He dragged her back by the neck, stating, "Now I am going to kill you or your baby before I leave because you didn't do what I said." As he jumped on her back, punching at her, she crouched in a corner, attempting to ward off the blows to her stomach. At one point his hand passed her mouth; she bit him hard and then screamed.

A neighbor heard the screams and called the police. Moments later Toni R.'s husband arrived home unexpectedly; he was unable to enter because the screen door had been locked by defendant. When the doorbell rang, Mrs. Toni R. screamed repeatedly that a man was trying to

rape her. Defendant grabbed his pants and fled through the back door.

Although defendant was chased by the husband and a neighbor, he eluded them and was not apprehended until later in the day when police tracked down the license number of the vehicle he entered for his escape. The vehicle was registered to Marlene Bell, defendant's girlfriend. Later, in a photographic lineup, Mrs. Toni R. identified defendant as her assailant.

Defense Evidence. The defense presented alibi and character witnesses.

Leola Nicholson, defendant's grandmother, testified that defendant was at home with her at the time of the attack on Gwendolyn and the two boys. She had raised defendant after his mother died of cirrhosis of the liver when defendant was four years old. His father had never taken any interest in the boy. The grandmother also testified that defendant had always been an obedient child, had finished the 10th grade and joined the service for a short time, and had been a good father to the 2 children of his "wife," Marlene Bell.

Cora Mays, defendant's older sister, described his impoverished childhood. She also said he was a "normal" child who never got into trouble. She testified that he got along well with children, was good to them, and was not the kind of person to commit the crimes of which he was convicted.

Many friends and neighbors testified to defendant's good character, that he was never in trouble, and that he played with and was good to neighborhood children. Six

or more relatives described defendant's kind nature and good habits – no drinking, smoking, or drug taking – and none believed defendant was capable of committing the crimes charged. Several friends and relatives testified to seeing defendant in the neighborhood variously between 7 a.m. and 8:30 a.m. on the day of the killings. An investigator, Curtis Latimore, testified that it took 30 minutes to drive in moderate traffic from the scene of the murders to 70th Street where defense witnesses claimed to have seen defendant at approximately the time of the murders.

It was stipulated that defendant was once a witness to a robbery, assisted police in their investigation, and testified for the prosecution at the preliminary hearing.

Michael Lyons, trial counsel at the first trial, testified that he had thought that a psychiatric defense would be essential and, in aid of that defense, he had advised defendant to tell Dr. Stalberg, a court-appointed psychiatrist, that he had committed the crimes charged. The defense had called Dr. Stalberg as a witness in the first penalty trial.

On cross-examination of Lyons, the prosecution suggested that Lyons was lying about having told defendant to confess to Dr. Stalberg. And on redirect, the defense sought to establish that Lyons was an inexperienced criminal attorney at the time he represented defendant in the first trial.

Prosecution Rebuttal Evidence. A police officer testified that, on the day of the killings, when he called Leola Nicholson in an effort to locate defendant, she became

quite excited and asked several times, "What has that boy done now?"

The main rebuttal witness was Dr. Stalberg, who testified that he had been retained by the defense in the prior trial to explore possible psychiatric defenses and that, in the course of an interview, defendant admitted that he went to Gwendolyn's house, engaged in sexual activity with her, stabbed her because he was afraid she would scream, and then stabbed her sons several times. On cross-examination Dr. Stalberg testified that in 1982, at the time of the retrial, he again contacted defendant in jail but refused to participate in the case because defendant no longer admitted culpability for the crimes.

Instructions and Deliberations. The trial judge instructed the jury before the closing arguments of counsel. The judge instructed on the factors of aggravation and mitigation in the statutory language (former § 190.3) and added that they "may consider as a mitigating factor any possible doubt as to the defendant's guilt." The jurors were also told: "Each of you must decide the case for yourself, but should do so only after a discussion of the evidence and the instructions with the other jurors." During deliberations the jury received additional instructions on the applicability of certain mitigating factors, on the duty of jurors during deliberations, and on the effect of a deadlocked jury.

II.

A. Middeliberation Proceedings.

Defendant's first two assignments of error relate to proceedings conducted during the deliberations of the

jury. Defendant contends that the trial judge, by her middeliberation instructions and responses to questions from the jury, withdrew insanity and mental or emotional disturbance as potential mitigating factors. It is also asserted that the trial judge coerced a juror into returning a sentence of death. In order to interpret the proceedings and ascertain the significance and meaning of what was said based on the whole record, we set out the middeliberation proceedings as to each contention chronologically and in detail.

1. The Jury Requests for Clarification

On the third day of deliberations the court, after consultation with counsel, summoned the jury and responded to three written jury questions as follows:

"Question Number One: 'Is the defendant convicted of premeditated murder?' [Answer:] The defendant was convicted of two premeditated and deliberated murders.

"Question Number Two: 'What happens if we have a split jury?' [Answer:] A mistrial would be declared, and the jury dismissed.

"Question Number Three: 'Do we have to have expert testimony as to mental or emotional disturbance to consider it as a mitigating circumstance?' [Answer:] Mental or emotional disturbance is not always necessarily proved by the testimony of an expert such as a psychiatrist. It may be proved by any other testimonial evidence but not by speculation."

When a juror stated that, as to one of the questions, the judge "had answered it, but I don't think it answers

it," the court agreed to reread the answers and suggested that the jury submit additional written inquiry and pinpoint the "unanswered problem." The jury then resumed deliberations.

Two hours later, the jury was back with two further questions. The court indicated that it did not have the answer to the first question and would respond on the following day.[2] The second question (in two parts): "Do a majority of the jurors have the right to examine and cross-examine the minority as to their reason for a decision?" "Do all jurors have an obligation to continue to discuss the matter if we have not reached a decision?" To this question the court reread two instructions previously given[3] and added; "The jury has an obligation to discuss

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[2] The first question: "Do we have the option of concluding from the nature of the crimes committed that Randy Haskett may be/is mentally or emotionally disturbed based on the testimony regarding the nature of the crimes?" on the following day, the court informed the jurors that "[t]he attorneys and I have consulted and this is our request: Will you please expand and clarify as much as possible what you have in mind so that we can understand it a little better and answer your question. The minute I receive that, I will be in touch with the attorneys, and we will try to answer it for you." The record contains no further reference to that specific question; apparently the jury did not pursue the matter, nor did the court.

[3] The following two instructions were reread:

CALJIC No. 17.41: "The attitude and conduct of jurors at the beginning of their deliberations are matters of considerable importance. It is rarely productive of good for the juror at the outset to make an emphatic expression of his opinion on the

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the matter until it arrives at a verdict or it's hopelessly deadlocked." There were no further deliberations on that day.

On the following morning, the fourth day of deliberations, the foreman reported to the bailiff that the jurors were "having a little confrontation" and that "things were getting out of hand." The bailiff in turn reported to the court that he had told the foreman to address the court in writing. Later on the same morning, with defendant, counsel, and the jury present, the court stated: "Mr. Foreman, you sent to the court a note which in effect indicates that the jury is hopelessly deadlocked. If the court were to ask you to continue deliberations, do you think there is any reasonable probability that you might ever arrive at a verdict? [The Foreman:] No, your honor. I don't think at this time that we could." But when asked if "there is anything at all that the court could do further to assist the

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case or to state how he intends to vote. When one does that at the beginning, his sense of pride may be aroused and he may hesitate to change his position, even if shown that it is wrong. Remember you are not partisans or advocates in the matter, but are judges."

CALJIC No. 17.40: "Both the people and the defendant are entitled to the individual opinion of each juror. [¶] It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict, if you can do so. Each of you must decide the case for yourself, but should do so only after a discussion of the evidence and instructions with the other jurors. [¶] You should not hesitate to change an opinion if you are convinced it's erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision."

jury in arriving at any kind of a verdict," the foreman responded, "yes." The court directed the foreman to put in writing whatever it was the court might do to assist the jury.

That afternoon, in chambers with counsel, the court discussed a note from the jury which asked a number of questions and also stated that there was an unwillingness among "some of the jurors" to discuss the case and to go by the evidence. The court dealt first with the allegation that some of the jurors were not acting properly.[4] After discussion, the court denied a prosecution motion to conduct a hearing regarding the jurors who were allegedly acting "improperly," i.e., not following the law.

The court then dealt with the questions contained in the note. The judge summoned the jury into the courtroom and answered the first three questions in the negative: "Should a decision be based entirely on the fact that this would be a deterrent?" "Should we take into consideration that there might be a jail break as part of the reason for making a decision?" "Should we base our decision entirely on the size of the stab wounds?"

To a fourth question, "Is it the duty of the fellow jurors to persuade by verbal force questions and accusations to obtain a common decision?," the court again

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[4] In that regard the note read in pertinent part:

"Some of us feel there is not a willingness among some of the jurors to discuss the case and to go by the evidence that has been presented. They are trying to speculate on evidence not presented. There is a doubt in their mind about the sanity of Randy Haskett, which has not been presented in this case."

reread the instructions on the jurors' tasks, the need for individual opinion, and the duty to deliberate. (See fn. 3, *ante*, p. ___ [typed maj. opn. p. 11.) The court added: " 'Verbal force,' and 'accusations,' as used in question four have no place in your deliberations."

The next question read: "There was to be a question asked of the judge, whether we could consider insanity based on the act of repeated stabbings of the victim." The court answered: "The defendant is presumed to be sane. The jurors cannot consider insanity as a mitigating factor."

The final question of the afternoon was described as a "collective" question: "All twelve jurors need to be further clarified on their obligations as jurors. The instructions as read so far are not considered by the majority to be sufficient. We need to have clarified whether we may use something as a mitigating factor if it has not been proven or substantiated by evidence presented. Can we ignore testimony of witnesses if there is substantial corroborating evidence of that witness's testimony?" The court answered that question as follows: "It is the duty of the jurors to discuss the evidence and not speculate on evidence not presented. Each juror should decide the case for him or herself after a discussion of the evidence and instructions with the other jurors. You may consider pity, sympathy, and mercy in deciding the appropriate penalty. However, you must not be governed by mere conjecture, prejudice or public opinion." At the jury's request, the court sent the reporter to the jury room to reread the questions and answers.

There were no further questions from the jury. On Friday, the fifth day of deliberations, the jury requested a reread of the testimony of Gwendolyn R. And on the following Monday, the jury informed the court that "one juror" refused to discuss the case and disregarded the court's instructions: "We have one juror who continues to use insanity or mental disturbance as a mitigating circumstance even though you, the judge, have said we can't use it. He refuses to discuss the case any more. Is there anything you can do, being he is disregarding your ruling completely?"

Over objection of defense counsel, the court then summoned one of the jurors and conducted the hearing which gave rise to the claim of coercion of verdict, discussed in the following section. At the conclusion of the hearing, the court informed the jury that "there has been no failure on the part of any juror to follow the court's instructions, and I will ask you to continue your deliberations." On the afternoon of the following day, the jury reached its verdict of death.

Defendant asserts that the court's responses to the jury's inquiries withdrew from its deliberation all facts and factors relating to mental or emotional disturbance as mitigation and told the jury that, as a matter of law, it could not consider either insanity *or* mental or emotional disturbance as a factor in mitigation. We disagree.

It is well settled that a capital jury may not be precluded " ' "from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." ' . . . [Tlhe

sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.' " (*Skipper v. South Carolina* (1985) 476 U.S. 1, 4, citations omitted, italics in original.) (See also *Mills v. Maryland* (1988) 486 U.S. 367 and *McKoy v. North Carolina* (1990) 494 U.S. ___ [108 L.Ed.2d 369] [a jury may not be precluded, by the requirement of unanimity, from considering any mitigating factor].)

Skipper was based on the court's earlier decisions in *Lockett v. Ohio* (1978) 438 U.S. 586 and *Eddings v. Oklahoma* (1981) 455 U.S. 104. *Lockett* invalidated an Ohio statute which limited mitigating factors to three and did not include consideration of any mitigating aspects of defendant's character and background. (*Lockett v. Ohio, supra,* 438 U.S. at pp. 597-605; see also *Bell v. Ohio* (1978) 438 U.S. 637 [same statute, which limited consideration of mental state to psychosis or mental deficiency (not amounting to insanity) and precluded consideration of mental deficiency because of low intelligence and use of drugs].) *Eddings,* interpreting an Oklahoma statute which provided that in the sentencing proceedings evidence "may be presented as to any mitigating circumstances," held that a sentencer could determine the weight to be given relevant mitigating evidence, but could not, as a matter of law, exclude the evidence from consideration. (*Eddings v. Oklahoma, supra,* 455 U.S. at pp. 114-115.) We conclude hereafter that the trial judge in the instant case did not violate the dictates of *Lockett* and its progeny – the trial judge did not withdraw from the jury's consideration any factor which was supported by the record or preclude the jury from considering any evidence which had been presented at the trial.

Prior to commencing its deliberations, the jury was advised to consider all of the evidence that had been received during any part of the trial. The jury was then instructed to "consider, take into account and be guided by the following factors, if applicable: . . . [¶] (A) The circumstances of the crime of which the defendant was convicted in the present proceedings and the existence of any special circumstances found to be true; [¶] . . . [¶] (D) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance; [¶] . . . [¶] (H) Whether or not, at the time of the offense, the capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was impaired as a result of mental disease or defect or the effects of intoxication; [¶] . . . [¶] (K) Any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death."

At defendant's request, the jury was also instructed: "You may consider pity, sympathy and mercy in deciding the appropriate penalty. However, you must not be governed by mere conjecture, prejudice or public opinion" and "You may consider as a mitigating factor any possible doubt as to the defendant's guilt. A possible doubt may arise after a consideration of all the facts and evidence you may have heard."

It is conceded that defendant proffered *no evidence* of diminished mental capacity or any impaired mental state. Further, it is undisputed that defense counsel did not proffer the evidence of the repeated stabbings as a basis

for a sentence less than death; nor did counsel suggest that any inferences should be drawn therefrom as an indication of extreme mental or emotional disturbance or any other state of mind. The closing argument of defense counsel underscored and stressed the evidence of alibi and attacked the credibility of Mrs. Gwendolyn R., pressing for lingering doubt of guilt and asking the jury to show mercy.

From the chronology of the jury's questions related above, we can surmise that the only possible evidence the jury was considering as relating to defendant's mental state was the number of wounds and the manner in which they were inflicted on the victims.[5]

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[5] The People contend that the nature of wounds and number of stabbings cannot, as such, constitute evidence of emotional disturbance or of any mental state. We stated in *People v. Anderson* (1968) 70 Cal.2d 15, 31, that the manner of killing (brutal hacking) did not support an inference that the act of killing was premeditated rather than hasty and impetuous. In *Haskett I* (*supra*, 30 Cal.3d at p. 850) we agreed with defendant that the method of killing – many stab wounds randomly inflicted – did not in itself establish premeditation and deliberation. In *People v. Steger* (1976) 16 Cal.3d 539, 546, we cautioned against giving undue weight to the severity of a victim's wounds in determining whether a killing was committed by means of torture. And in *People v. Fields* (1983) 35 Cal.3d 329, 370, we agreed that proof of criminal acts is insufficient by itself to demonstrate insanity or mental disease or defect.

The foregoing authorities teach that use of wounds or manner of killing has limited value in supplying evidence or inferences of a requisite state of mind, and we find no authority assessing the role played by the nature of wounds or brutality of the crime in the capital *sentencing* function. In our

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Assuming, then, for the purpose of argument that the jury can consider the wounds and manner inflicted as relating to defendant's mental state, we address defendant's first contention – that the trial court's answers to the jury questions improperly removed his mental or emotional state from their consideration. The court's initial instructions relating to defendant's mental or emotional state were given in the statutory language.[6] Only two of the jury's later requests for clarification concerned mental or emotional disturbance. The middeliberation question concerning whether it was necessary to have expert testimony to prove mental or emotional disturbance was correctly answered by the judge. Moreover, the

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experience, the more brutal the crime the greater the likelihood that it will weigh as aggravating rather than mitigating.

Having said that, however, we recognize that, in a capital case, the jury is given wide latitude to determine the applicability of the various factors which statutorily define its sentencing function (see *People v. McDowell* (1988) 46 Cal.3d 551, 577-578; *People v. Jackson* (1980) 28 Cal.3d 264, 316), and we have rejected repeated efforts to rule that the trial court errs when it instructs on inapplicable factors. (*People v. Miranda* (1987) 44 Cal.3d 57, 104-105; *People v. Ghent* (1987) 43 Cal.3d 739, 776-777.) In the instant case, the jury could appropriately consider the nature of the wounds as a circumstance of the crime, as an indication of extreme mental or emotional disturbance, or, under the "catchall" factor, as a circumstance which extenuates the gravity of the crime or pertains to any aspect of defendant's character or record.

[6] See former section 190.3; however, the court assigned her own letter designation to the respective factors. The "mental or emotional disturbance" factor was designated (D) (see *ante*, p. ___ [typed maj. opn. p. 17]).

question demonstrated that the jury *was* evaluating that mitigating factor. The follow-up question regarding the "nature of the crimes" as evidence of mental disturbance (see, *ante*, p. ___, fn. 2 [typed maj. opn. p. 10, fn. 2]) was not resubmitted. And finally the jury's question whether it could "use something as a mitigating factor if it was not proven or substantiated by evidence" graphically illustrates that the jury was making the correct distinction between its right to *consider* a factor in mitigation with its duty to find the factor *inapplicable* if there was a lack of evidence to support it.

In *Boyde v. California* (1990) ___ U.S. ___ [110 S.Ct. 1190], the court addressed a constitutional challenge to an instruction which purportedly violated the Eighth Amendment requirement that the jury be able to consider and give effect to all relevant mitigating evidence offered by a defendant. At issue was factor (k) of CALJIC, former No. 8.84.1 which, though not an erroneous instruction, was claimed to be ambiguous and subject to erroneous interpretation. The court stated, "the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (110 S.Ct. at p. 1198.)

The high court found no reasonable likelihood that Boyde's jurors interpreted the instruction in a constitutionally restricted manner, but added: "Even were the language of the instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation. Other

factors listed in CALJIC No. 8.84.1 allow for consideration of mitigating evidence not associated with the crime itself. . . . " (110 S.Ct. at P. 1199.)

Applying the *Boyde v. California* standard to these proceedings, we think there is not a reasonable likelihood that the jurors interpreted the court's instructions to prevent consideration of the stabbings, the wounds, or the nature of the crime in mitigation of penalty.

The instruction on mental and emotional disturbance as a mitigating circumstance, like the instruction in *Boyde v. California, supra,* ___ U.S. ___, is not concededly erroneous. Though it is claimed that the jury misinterpreted it, defendant can point to no instruction or response by the trial court as to that circumstance which could have prompted the note from the jury on the sixth day of deliberations that one juror was using "insanity or mental disturbance as a mitigating circumstance even though you have said we can't use this." Of course, the court had instructed the jury (correctly, we conclude hereafter) that the defendant was presumed sane and that they could not consider *insanity* as a mitigating circumstance.[7]

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[7] Unlike the dissent, we distinguish between insanity, incapacity due to mental disease or defect less than insanity, and mental or emotional disturbance. We agree that the court's instruction on the presumption of sanity effectively precluded the jury from considering insanity as a mitigating factor. We address in this part only the question whether the court instructed the jury that it could not consider the nature of the crime or the manner of killing as evidence of mental or emotional disturbance.

The jury was instructed to consider all of the evidence received during the trial – evidence of the stab wounds and the manner of killing (testimony and photographs) had been introduced. The jury was instructed on extreme mental and emotional disturbance as a mitigating factor and was told that the evidence of mental or emotional disturbance did not have to be proved by expert testimony. It is inconceivable that the jury would have believed that it *could not consider* that factor. (See *People v. Boyde* (1988) 46 Cal.3d 212, 251.)

Nothing in the court's comments, quoted in their entirety above, could have misled the jury to believe they *could not* consider defendant's emotional or mental state in the deliberation of penalty if the jury found relevant evidence to support that particular mitigating factor. The jurors clearly were in disagreement on whether there was sufficient relevant evidence to find that mitigating factor to be present. And insofar as we cannot determine the precise nature of the conflict among the jurors because of the court's reluctance to inject herself in the dispute over the evidence, we should defer to the court's analysis of the jury's requests as indicating that the jurors were at odds as to whether the evidence warranted application of the mental disturbance factor. The trial court, after all, is in a better position than an appellate court to interpret the tone and nuances of the problems in the jury room. Having presided over the trial, the judge appreciates the full context in which the jury's questions are posed.

We also reject defendant's contention that the court's instruction that the defendant was presumed sane and that the jury could not consider insanity as a mitigating factor removed extreme mental or emotional disturbance

from the jury's consideration. In this regard, defendant raises two points – (1) the presumption of sanity applies only to the guilt phase and the court erred in instructing thereon in the penalty trial, and (2) the jury was not using the term insanity in its legal sense but as a term of art for a lesser mental state, i.e., mental or emotional disturbance, which the jury could properly consider.

Defendant cites no authority – and we have found none – for the proposition that the presumption of sanity ends at conviction and has no application at the sentencing phase of a criminal trial. In California, insanity cannot be proved at the trial on the issue of guilt. The defense is raised by a separate plea and decided in a separate trial. (See § 1026, subd. (a).) Defendant did not place his sanity at issue; as a result, at the guilt trial he was "conclusively presumed" sane, and evidence tending to prove insanity was inadmissible. (*People v. Wells* (1949) 33 Cal.2d 330, 350.)

Although California's statute enumerating potential mitigating factors in capital. cases includes one that permits consideration of evidence of impairment due to mental disease or defect (the trial court's factor (H) in the case at bar; see *ante*, pp. ___-___ [typed maj. opn. pp. 17-18]), that factor clearly contemplates a mental state less than insanity. Under the American Law Institute test, adopted in *People v. Drew* (1978) 22 Cal.2d 333, a person is insane and not responsible for criminal conduct "if at the time of such conduct as a result of mental disease or defect he lacks *substantial* capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." (Italics added.) The statutorily enumerated mitigating factor which deals

with impairment due to mental disease or defect is not the *Drew* definition of insanity, missing an important word, "substantial," and obviously contemplating a lesser impairment of ability to appreciate criminality of conduct.[8]

As noted, no evidence of mental disease or defect was proffered by defendant; the trial court's factor (H) is simply not at issue in the case at bar and defendant does not contend otherwise. The essence of defendant's argument is that the jury was using the term "insanity" not in its legal sense but as a synonym for mental disturbance. However, our review of the record convinces us that the jury was not confusing the two concepts, although, as will appear, the foreman, at least, may have confused the terminology. First, as we illustrated above, there was no error in the instructions which clearly preserved, if applicable, the factor of extreme mental or emotional disturbance as mitigating. Our chronology further reveals that the jurors did have differing opinions as to whether there was any evidence to support an inference of emotional or mental disturbance. This is reflected in the final question asked by the jury concerning their obligations as jurors:

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[8] Significantly, the United States Supreme Court, considering the validity of the Ohio statute in *Lockett v. Ohio, supra,* 438 U.S. 586, and *Bell v. Ohio, supra,* 438 U.S. 637, was not concerned that one of the listed mitigating factor *excluded* evidence of insanity: "The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." (Ohio Rev. Code Ann. § 2929.04(B) (1975).) The high court was, however, concerned that the listed mitigating factor did not provide for consideration of *lesser* states of mental deficiency.

"We need to have clarified whether we may use something as a mitigating factor if it has not been proven or substantiated by evidence presented. . . . " The jury was told to discuss the evidence and not speculate on evidence not presented.

Defense counsel, and the dissent, make much of two instances in which the phrase "insanity *or* mental disturbance" was used.[9] (Italics added.) There are other comments, by the jurors, however, which indicate that they, singly and collectively, were not confusing insanity and mental or emotional disturbance.[10]

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[9] In one instance, a note from the foreman stated in part: "We have one juror who continues to use insanity or mental disturbance as a mitigating circumstance even though you, the judge, have said we can't use it." (See *ante*, P. ___ [typed maj. opn. p. 151.) Although the judge had ruled that insanity could not be used as a mitigating factor, *she had at no time indicated that mental disturbance could not be considered as a mitigating circumstance.* On two occasions the jury had asked for advice on the proof required for the mitigating factor of mental disturbance, and the court had twice instructed they could consider that factor based on any evidence other than specuiation. The foreman's note appears to acknowledge the court's instruction that mental disturbance "may be proved by any . . . testimonial evidence *but not by speculation.*" (Italics added).

On a second occasion, during a special hearing on "one juror's" alleged unwillingness to deliberate, the judge asked that juror: "Do you use insanity or mental disturbance as a mitigating circumstance?" See further reference to the judge's comment, *post*, page ___ [typed majority opinion page 351 in the discussion on coercion of the verdict.

[10] For example, among the notes sent to the judge just prior to the instruction on the presumption of sanity was one,

(Continued on following page)

In context and viewing the record as a whole, we are not persuaded that the jury was confused as to the distinctions between the concepts of (1) insanity, which the jury was correctly told not to consider, and (2) a lesser mental state, i.e., extreme mental or emotional disturbance, which they could and did consider. It is evident that what divided the jurors was not whether they could consider defendant's mental state as a mitigating factor but rather whether there was any evidence in the record to support that mitigating factor. It was obvious from the third day of deliberations, when the jury asked if expert testimony was necessary to establish mental state, that the issue troubling them was whether there was any evidence to support that mitigating factor.

The trial judge was keenly aware of the need to remain neutral in the dispute as to whether a particular factor in mitigation was applicable, i.e., whether there was evidence to support application of the factor. The court's comments to counsel indicate that she was alert to

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referred to earlier (*ante*, p. ___, fn. 4 [typed maj. opn. p. 13, fn. 4]), which recognized that defendant's sanity was not an issue in the case. The message to the judge complained that some of the jurors were trying to speculate on evidence not presented: "There is doubt in their mind about the sanity of Randy Haskett, *which has not been presented in this case.*" (Emphasis added.)

Later, during a special hearing (see *post*, p. ___-___ [typed maj. opn. pp. 33-34), a juror indicated that he was not considering insanity as a mitigating factor: "I figure if he was, we wouldn't be sitting in here now. If he was judged insane, we would not have had to come in."

the danger that whatever she said could be seen as an interpretation of the evidence and that she was also alert to the requirement that a trial court should not evaluate or assess the mitigating nature of particular items that concern the jury, for fear of unduly coercing the deliberations. (See *People v. McDowell, supra,* 46 Cal.3d 551, 578.) In *McDowell* the jury could not agree as to whether certain items of evidence were mitigating. We concluded that the court acted properly in directing the jury to the applicable instructions.

Here, too, the court did not err. The trial judge did not tell the jury that evidence from which mental or emotional disturbance might be inferred was irrelevant to the sentencing decision. The trial judge did not, as did the judge in *Eddings v. Oklahoma* refuse to consider proffered mitigating evidence. (455 U.S. 104, 112-113.) Nor was the court and jury encumbered, as was the sentencer in *Lockett v. Ohio,* by a statute limiting what might be considered in mitigation. (438 U.S. 586, 607-608.) The trial judge did not instruct the jury to disregard or not consider one of the circumstances of the crime – the repeated stabbings – if it found that circumstance applicable to the mental state factor. The trial judge merely stated, and correctly, that the jury had no discretion to conclude that defendant was insane. Accordingly, we find no violation of the dictates of *Lockett, Eddings,* and *Skipper.*

Even if, as the dissent asserts, the jury's note to the court on the sixth day of deliberations may have indicated a misunderstanding of the instructions given regarding the mental disturbance factor, other factors listed in CALJIC, former No. 8.84.1, i.e., the "catchall" (factor (k)) as well as the "circumstances of the crime"

(factor a), would allow for consideration of the evidence of the stabbings and the wounds. As did the court in *Boyde v. California*, "we follow the familiar rule stated in *Cupp v. Naughten* (1973) 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973): ' . . . that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge' " (110 S.Ct. at p. 1196). We conclude that there is no reasonable likelihood that the jury believed it could not consider any and all of the evidence introduced at the penalty phase in mitigation of penalty.

As a corollary issue, defendant also urges that the instruction on presumed sanity had the effect of eliminating from the jury's deliberations, as a mitigating factor, any possible lingering doubt as to defendant's sanity and ability to premeditate. He relies on *People v. Terry* (1964) 61 Cal.2d 137, 145-147. *Terry* is not apposite. In that case, which was also a retrial of the penalty issue only, the trial court did not permit the jury to take into consideration defendant's theory of the events, evidence tending to show his possible innocence of the crimes involved in the proceedings.

Here, however, defendant does not charge that the court excluded any proffered evidence. A number of witnesses testified to his alibi, and no claim is made that any specific evidence was offered and rejected. We have determined in the prior discussion that the court did not err in its instructions on the presumption of sanity and the removal of sanity as a factor in mitigation. Inasmuch as sanity was not at issue in this case, at either the guilt or the penalty phase, the court's instruction on the presumption of sanity could not have affected the entirely

separate question of whether the jury had any "lingering doubt" as to defendant's guilt.

2. Coercion of Juror Lizana.

Defendant's second contention is that Juror Roy Lizana was coerced to return a sentence of death. We disagree.

On the sixth day of deliberations, the jury's requests for clarification for the first time focused on a single, allegedly recalcitrant juror. On that day, the jury submitted a question: "We have one juror who continues to use insanity or mental disturbance as a mitigating circumstance even though you, the judge, have said we can't use it. He refuses to discuss the case any more. Is there anything you can do, being he is disregarding your ruling completely?" Following a discussion with counsel and over the objection of defense counsel, the court determined that a hearing was in order to ascertain whether the juror was in fact refusing to deliberate.

The court summoned the jurors and asked them collectively whether there was any among them who felt he or she could not or would not consider the evidence and follow the court's instructions. There was no response. The court then secured from the foreman the name of the allegedly offending juror (Roy Lizana). At this time defense counsel asked the court to determine the numerical division of the jury. The court refused to do so and excused all jurors except Mr. Lizana.

After cautionary warnings concerning the limited nature of the examination it was conducting, the court

obtained Lizana's assurance that he was not using *insanity* as a mitigating circumstance and that he was following the court's instructions in that regard. The entire colloquy follows: "[Court:] Mr. Lizana, before I ask you any questions, sir, I want to caution you. I don't want you to give me any of your thinking whatsoever. You have a right your own private thinking. What I am obligated to go into is the subject matter of the note which indicates that you were considering something as a mitigating factor that I indicated there was no evidence of. Any of your other reasons for what your thinking is are not my concern at this time. They are your own concern. You may have a thousand reasons for any particular way you intend to vote, and those reasons may all be valid reasons. The only problem that I have to find out at this time is are you disregarding the court's instruction that was given to you that Mr. Haskett is presumed sane and that this may not be considered as a mitigating factor. That is all you have to answer. You don't have to answer me another thing. Do you understand? [Lizana:] I understand what you said. That wasn't my idea. That was the question. That was the question they sent in to you. [Court:] That is all I want to know. Then, as far as you are concerned, are you following the court's instruction on this particular point? [Lizana:] Yes, I am. [Court:] That is all I want to know. As far as I am concerned, that is sufficient. But I can only go on what I have heard. Then it's your assurance that you are not using this as a mitigating circumstance and you are following the court's instruction as far as whatever conclusions you have come to; is that correct? [Lizana:] I figure if he was, we wouldn't be sitting in here now. If he was judged insane,

we wouldn't have had to come in. Leave it at that. [Court:] Don't tell me any more. All I want is your assurance. That is sufficient for me."

Though pressed by the prosecution to ask further questions to test Lizana's credibility concerning his alleged refusal to deliberate, as to which the court had not yet questioned Lizana, the court refused, stating that her only concern was whether Lizana was unwilling or unable to follow the court's instruction: "In any other case, somehow I might consider going into a jury deliberative processes, but in this case where we all are aware that any individual who is exercising mercy can hang up a jury, I am not going to go into a situation – if he were hanging up a jury because his sole reason is that he will not follow the court's instructions on a particular point, then I might go into it further. But if he has other reasons on which he is basing his disagreement, and that is what he has represented to me, . . . I would not go into deliberative processes where we have a situation in which an individual, one individual, decides to exercise mercy and question him on that."

Nonetheless, despite her expressed reluctance to question Lizana on his alleged refusal to deliberate, the court recalled Lizana and asked several questions: "Mr. Lizana, relax. This is just to be sure that I understand you. Do you use insanity or mental disturbance as a mitigating circumstance?" Lizana responded, "No, ma'am." The court asked, "Do you refuse to discuss the case with other jurors?" Lizana stated, "No. I never did refuse to deliberate." And to the question, "Are you willing to continue deliberating?," Lizana answered, "I am."

The court thereafter directed the jury to continue deliberating, and on the afternoon of the following day the jury reached its verdict of death.

Defendant urges that the court proceedings in relation to Juror Lizana were fatally coercive. His attack is multifaceted. Not only does defendant question the propriety of conducting a hearing at all, he also asserts that a combination of factors in this case lead to the inevitable conclusion that the juror was coerced. Our review of the record, including the court's conduct and remarks, discloses no impropriety.

In *People v. Keenan* (1988) 46 Cal.3d 478 we addressed the issue of alleged coercion due to the trial court's remarks during an inquiry into possible juror misunderstanding or misconduct. There, as here, the defendant claimed that, in obviously stressful circumstances, with assertedly only a single juror holding out against the death penalty, certain of the court's remarks unfairly coerced the minority juror. We found no impropriety. The court's comments in the instant case are even more innocuous than those in *Keenan*, where the alleged recalcitrance concerned ability or willingness to impose the death penalty.

The duty of the court to conduct the inquiry is well settled. (See *People v. Burgener* (1986) 41 Cal.3d 505, 519-520 [once a juror's inability to perform his duty is called into question, a hearing to determine the facts is clearly contemplated, and the failure to conduct a hearing is an abuse of discretion]; *People v. Keenan, supra*, 46 Cal.3d 478.) We stated in *Keenan* that "when a trial court learns during deliberations of a jury-room problem

which, if unattended, might later require the granting of a mistrial or new trial motion, the court may and should intervene promptly to nip the problem in the bud." (*Keenan, supra,* 46 Cal.3d at p. 532.) We cautioned, however, that "any intervention must be conducted with care so as to minimize pressure on legitimate minority jurors." (*Id.* at p. 533.)

Here, the court had ample grounds to conduct an inquiry based upon the foreman's note which suggested that a juror was refusing to perform his duties. Defendant nevertheless maintains that, even assuming that an inquiry was necessary, factors or circumstances peculiar to this case rendered the inquiry inherently coercive. We consider each of the factors and find that, neither singly nor in combination, do they import coercion in the otherwise properly conducted proceeding.

First, defendant states that the trial judge singled out the only holdout juror and suggested to him that he was not obeying his oath *after* the numerical split *and direction of the vote* was known and revealed. Defendant is wrong in several respects. There is no indication tnat Lizana was the "last, lone, holdout juror" who opposed the death penalty. Indeed, all that was revealed by the foreman's notes to the court was that one juror *allegedly* was not following the court's instructions and was refusing to deliberate.

The numerical split and direction of the vote was not known or revealed. The court was careful to avoid learning the jury's division on the ultimate question of life or death and, as pointed out previously, rejected defense counsel's request to secure the count.

Finally, although both before and during the hearing Lizana was necessarily aware that he was being accused of refusing to perform his duties, at no time was it suggested that he was "disobeying his oath." The court at all times was discreet and sensitive to allay any fears Lizana might have had as to the purpose of the inquiry. The record belies defendant's claims that Lizana was identified and "berated" for not obeying his oath, that the trial judge suggested she "believed" the foreman's note accusing Lizana of disobeying her orders, and that, by her answers and instructions, the trial judge "implied that she agreed with the jurors who were voting for death." Defendant mischaracterizes the record further when he asserts that the judge's instructions had "the ring of flat orders not to vote for life." To the contrary, the judge's comments expressed a concern not to impose any view on Lizana and indicate that the judge was sensitive and concerned to protect Lizana's right to vote for life on the basis of mercy or for any reason other than insanity.

Unlike in *People v. Carter* (1968) 68 Cal.2d 810, 816, there was no urging of an agreement and no pressuring to reach a verdict. Nor did the judge encourage Lizana to reconsider his position in light of the positions taken by the other jurors, as in *People v. Gainer* (1977) 19 Cal.3d 835. There is no indication that Lizana opposed a death verdict as such; the dispute among the jurors was clearly focused on the applicability of the factors to be considered in reaching the verdict. We find no impropriety in the manner in which the trial judge conducted the hearing.

The second factor cited by defendant as adding pressure and coercion of verdict was the presence in the

courtroom of the family members of the victims when Lizana was subjected to the court's inquiry. Be that as it may, the defendant's family members were also present. We find no relevance in the fact that some members of the victim's family were sitting on the "plaintiff's" side of the courtroom, closest to the jury box. The only case cited by defendant is a Mississippi case (*Fuselier v. State* (Miss. 1985) 468 So.2d 45) in which the appellate court found error in permitting the victim's daughter to sit at the prosecutor's table.

The third factor which, it is alleged, tended to coerce Lizana's decision was the knowledge that a prior jury had returned a verdict of death. On voir dire each juror was told that the case had been "sent back to this court on a retrial on the penalty phase only because of some legal errors." That the prior verdict was death was revealed in the course of the trial in comments by the prosecutor, defense counsel, and witnesses. Defendant's grandmother testified, for example, that she was present at the first trial when they "give him the gas chamber." Defendant cites no authority to suggest that knowledge of the prior verdict is necessarily coercive. There was no objection at the trial. at any time when the information was revealed. We are persuaded that the jury selection procedures and the instructions given adequately protected against any coercive influence from the knowledge that a prior jury had returned a death verdict.

Fourth, defendant complains that misinformation as to the consequences of a failure to reach a verdict may have swayed Lizana to join the majority. When the jury had asked, "What happens if we have a split jury," the court replied, "A mistrial would be declared, and the jury

dismissed." Defendant urges that the court should have advised, in accord with former section 190.4, subdivision (b), that the defendant would in that circumstance have been sentenced to life without possibility of parole.

We decided this issue contrary to defendant's position in *People v. Kimble* (1988) 44 Cal.3d 480. We found no error in the trial court's refusal to educate the jury on the legal consequences of a possible deadlock. We also noted the policy reasons for the holding: "[A]ny juror inclined against a finding that death was the appropriate penalty would have realized he could prevail simply by refusing to participate in good faith in the deliberations: by remaining obdurate and causing a jury deadlock, he would have in effect a veto power over the verdict." (*Id.* at p. 515.) (Accord, *People v. Bell* (1989) 49 Cal.3d 502, 552 [also tried under the 1977 death penalty statute].) In *People v. Belmontes* (1988) 45 Cal.3d 744 we likewise found no error in the failure of the court to instruct the jury on the consequences of a deadlock under the 1978 death penalty law.

The final coercive factor, urges defendant, is the court's responses to the jury's inquiry concerning insanity and mental disturbance. The thrust of the argument is that they were coercive because they were erroneous. Having decided that the responses were not erroneous, we reject the contention that Lizana was improperly swayed by the comments.

In sum, we conclude that the court did not err in conducting an inquiry and, further, that the manner in which the inquiry was conducted was not coercive. Neither singly nor in combination did the factors cited by

defendant coerce Juror Lizana to return a verdict of death.[11]

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[11] Concurring in a suggestion made at oral argument, the dissent states that the examination of Lizana concerning alleged misconduct was improper in that the inquiry invaded Lizana's mental processes. The dissent fails to distinguish between the task of determining *whether* misconduct occurred and the concededly more delicate task of determining the *effect of misconduct* on jurors.

The trial court is empowered to inquire into possible juror misconduct (*Keenan, supra,* 46 Cal.3d at p. 532; *Burgener, supra,* 41 Cal.3d at pp. 519-520), and *In re Stankewitz* (1985) 40 Cal.3d 391 does not hold otherwise. Asking a juror *whether* he is following the court's instructions – or using insanity as a mitigating fact, in contravention of the court's instructions – does not implicate the juror's reasoning process. The jury is bound to receive the law as instructed by the judge; the jurors "are not allowed either to determine what the law *is* or what the law *should be.*" (*Stankewitz, supra,* 40 Cal.3d at p. 399.)

The rule against inquiring into a juror's mental processes is contained in Evidence Code section 1150. The section applies only "[u]pon an inquiry as to the validity of a verdict. . . . ." *In re Stankewitz, supra,* 40 Cal.3d 391 was a petition for writ of habeas corpus, and *People v. Guzman* (1977) 66 Cal.App.3d 549 and *People v. Hedgecock* (1990) 51 Cal.3d 395, cited by the dissent, concerned inquiries made of jurors on motion for new trial. In *Stankewitz,* we determined that certain statements by one juror constituted serious misconduct, but found inadmissible, under Evidence Code section 1150, statements of other jurors that they were not influenced or affected by the alleged misconduct. In *Guzman, supra,* the misconduct was conceded, and the only question addressed by the Court of Appeal was the propriety of discharge and substitution of an alternate juror. In *Hedgecock, supra,* we held that it is within the discretion of a trial court to conduct an evidentiary hearing to determine the truth or falsity of allegations of jury misconduct

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3 Remand on Reversal of Judgment for Coerced Verdict.

Defendant urges this court to adopt a rule that, when a 1977 death penalty case is reversed because of coercion of verdict, the case must be remanded with directions to the trial court, to enter a sentence of life without possibility of parole. The rule would apply here, it is suggested, because the trial judge should have declared a hung jury but instead permitted events to exert undue pressure on the jury to reach a verdict.

The allegation that the jury was "hopelessly deadlocked," entitling defendant to the benefit of the statutorily mandated sentence of life without parole, is without foundation in the record. A jury may be discharged after submission without reaching a verdict when "at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." (§ 1140.) The determination whether there is reasonable probability of agreement rests in the sound discretion of the trial court. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 775.) The judge did not abuse her discretion when, learning of the impasse, she inquired whether there was anything she could do "to assist the jury in arriving at any kind of

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and to permit the parties to call jurors to testify at such a hearing. Neither *Guzman* nor *Hedgecock* stand for the proposition that every answer to a judge's question implicates the answering Juror's reasoning process, as asserted by the dissent.

verdict." As illustrated above, the trial court exercised its authority without coercion of the jury.

B. Testimony of Dr. Stalberg.

Defendant argues that it was error to admit the testimony of Dr. Stalberg, called as a rebuttal witness by the prosecution over defense objection. Dr. Stalberg had been appointed by the court at defendant's request before the first trial and had been called to the stand by the defense at the penalty phase of that trial. (See *Haskett I, supra,* 30 Cal.3d at p. 868.) At that time, Dr. Stalberg testified that defendant was mildly retarded and capable of rehabilitation. On cross-examination, he stated that defendant suffered from a compulsive sexual disorder. Also, apparently on cross-examination, the doctor testified that defendant admitted that he attacked Mrs. Gwendolyn R. and killed the two children.

At the second penalty trial Dr. Stalberg was called by the prosecution as a rebuttal witness. Over defense objections, the doctor repeated the testimony about defendant's admissions.

In a multipronged challenge to the admissibility of the doctor's testimony, defendant (1) argues that he received no notice of the prosecution's intent to call Dr. Stalberg, (2) invokes the attorney-client and the psychotherapist-patient privileges, (3) asserts that the admissions were involuntary, and (4) suggests that he was entitled to "use immunity." Defendant did not object to the testimony in the trial court on all of these grounds. We nevertheless discuss each on its merits. We conclude

that the court did not err in admitting the doctor's testimony.

1. *Prior Notice.* Defendant's claim that he was entitled to notice of intent to call Dr. Stalberg under former section 290.3 of the 1977 penalty statute was raised in the trial court. The trial court overruled the objection on grounds that Dr. Stalberg was being called as a rebuttal witness. In arguing against this claim, the prosecutor contended that he had been "sandbagged" by the defense. He explained that he had not planned to call the doctor; the defense had given him reason to believe that there would be no defense evidence as to guilt at the second penalty trial and that the defense would concentrate on mitigation with background and character evidence. However, as previously noted, the defense did present alibi evidence in an attempt to raise a "lingering doubt" as to guilt.

In view of the defense evidence and claim of alibi, the trial court properly found the doctor's testimony admissible as rebuttal. On request of defense counsel, the court expressly precluded any reference to "any psychiatric aspects," limiting the questioning to the fact that the psychiatrist interviewed defendant and that defendant admitted the offenses.

2. *Privilege.* In the trial court, defendant invoked only the psychotherapist-patient privilege (Evid. Code, § 1010 et seq.). This privilege exists when "a psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he or she may advise the defendant whether to

enter or withdraw a plea based on insanity or to present a defense based on his or her mental or emotional condition." (Evid. Code, § 1017.)

The privilege was waived, however, when defendant called Dr. Stalberg to testify on his behalf at the first trial. " . . . Consent to disclosure is manifested by any statement or conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." (Evid. Code, § 912, subit. (a).) Defendant failed to object to *any* of the doctor's testimony at the first trial, effectively waiving the privilege. (See *People v. Slocum* (1975) 52 Cal.App.3d 867, 880-881.) The trial court did not err in overruling the claim of privilege.

On appeal, defendant invokes for the first time the attorney-client privilege (Evid. Code, §§ 952, 954) on the mistaken assumption that it has survived the waiver of the psychotherapist-patient privilege. *People v. Clark* (1990) 50 Cal.3d 583, discussing the differences between the psychotherapist-patient privilege and the attorney-client privilege, agreed that statements made to a psychotherapist may be made in the attorney-client relationship and, "unless defendant waived the privilege or did not intend that the statements be confidential, they continued to be privileged notwithstanding the fact that they were no longer confidential at the time of trial." (*Id* at p. 621.) The defendant's statements in *Clark* were revealed to potential victims and were thus no longer confidential at the time of trial, but in *Clark*, the defendant had at no time waived the privilege.

As the People argue, here defendant did waive the privilege when Dr. Stalberg was called to the stand by the defense in the first trial.

3. *Voluntariness of Admissions.* We reject the contention that the statements were inadmissible for failure to advise pursuant to *Miranda.* (*Miranda v. Arizona* (1966) 384 U.S. 436.) No objection was made on *Miranda* grounds at either trial, precluding the claim on appeal. (*People v. Milner* (1988) 45 Cal.3d 227, 236; *People v. Jackson* (1989) 49 Cal.3d 1170, 1188.) Further, the Miranda rules apply only to "custodial interrogation" – questioning initiated by, or at the direction of, law enforcement officers – not to questioning by a physician at the request of defense counsel. Here, defendant was represented by counsel who wanted defendant to confer with Dr. Stalberg for his own benefit, and the doctor correctly advised defendant that nothing revealed to the doctor could be used against defendant without the consent of his attorney. There was no violation of defendant's Fifth Amendment rights. (*Estelle v. Smith* (1980) 451 U.S. 454, upon which defendant relies, is not apposite. There, the accused was faced, while in custody, with a court-ordered psychiatric inquiry without notice to his counsel.)

Defendant also urges that the statements were involuntary in the traditional sense – they were coerced by, threats of the death penalty. We reject the argument on procedural grounds and on the merits. First, the doctor's interview with defendant was not state action within the meaning of the due process clause. "Coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the

Due Process Clause of the Fourteenth Amendment." (*Colorado v. Connelly* (1986) 479 U.S. 157.)

Furthermore, there is no evidence of impermissible coercion in the statements made by Dr. Stalberg in seeking defendant's cooperation to the interview. Dr. Stalberg told defendant that he would be convicted "for sure" and that if he did not confide in the doctor, he would "probably quite likely get the death penalty." Under the circumstances, keeping in mind that the examination of defendant was for the purpose of producing mitigating evidence on his behalf, we find no impropriety in the doctor's attempts to secure defendant's cooperation.

4. *"Use Immunity."* Defendant's final argument regarding the admissibility of the doctor's testimony is obscure. He argues that if we find the confession voluntary and not protected by privilege, we should declare a rule "giving capital defendants a kind of 'use immunity' consistent to that already recognized in analogous situations, that would require exclusion of a confession under the circumstances of the instant case." The crux of the argument appears to be that, inasmuch as defendant did not place his mental state at issue and did not take the stand, any incriminating statements made during the interview, should not be admissible. Defendant's argument ignores the fact that it was the defense, not the prosecution, which procured Dr. Stalberg's testimony at the first trial. Defendant cites no compelling reason or authority for fashioning a new rule in this regard. We dismiss the argument for lack of any authority to support it.

In sum, we find no error in the admission of the testimony of Dr. Stalberg, called by the prosecution in the second penalty trial.

C. Prosecutorial Misconduct

Defendant contends that the prosecutor engaged in prejudicial misconduct on numerous occasions during his closing argument. Except in one instance, however, he failed to object at trial to the comments to which he assigns error. He is therefore precluded from challenging those comments on appeal. (*People v. Green* (1980) 27 Cal.3d 1, 27; *People v. Miranda, supra,* 44 Cal.3d 57, 108; *People v. Poggi* (1988) 45 Cal.3d 306, 335.)[12]

As to several claims, defendant makes no reference to the record and we are unable to locate the statements of which he complains. As to several, we find no misconduct. And, as will appear, none of the claimed errors was of such significance that it could not have been cured by

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[12] Preliminarily, we reject defendant's argument that the trial court removed from both parties the burden of objecting to improper argument and took that burden upon itself. Defendant relies entirely on a partial comment by the court, made during a recess in the prosecutor's argument, when discussing with counsel how objections should be made during argument: "I feel it's my duty under the cases – and I checked them out at noon. . . . " The phrase, read in context, was clearly not intended to relieve counsel from making appropriate objections. The court stated: "Any objections you have should be taken out of the presence of the jury. If you feel you have to do something in the middle of argument, approach the bench."

an admonition. We discuss each instance of claimed misconduct in turn, beginning with that comment to which an objection was made.

1. *Misstatement of Law Regarding Rebuttal Witnesses.* Commenting on the defense witnesses to defendant's good character, the prosecutor stated: "Did I bring in witnesses to say that the defendant wasn't this or wasn't that? . . . So, do you think that I could bring in evidence of someone to say, well, no, he's a bad guy?" The court thereupon sustained a defense objection that the comments were a misstatement of the law – the prosecutor could impeach any witness. The prosecutor conceded that he could impeach a witness and continued with his argument. We see no prejudice to defendant in the passing erroneous comment that was immediately corrected.

2. *Absence of Mitigating Factor as Aggravation.* Although the prosecutor's argument, insofar as it characterized certain absent mitigating factors as aggravating, contravenes *People v. Davenport* (1985) 41 Cal.3d 247, his comments do not constitute prosecutorial misconduct requiring reversal of judgment. A timely objection and admonition could have cured any harm. (*People v. Green, supra,* 27 Cal.3d 1, 27.)

Furthermore, any potential for prejudice is minimized when, as in this case, the trial is held under the 1977, not the 1978, death penalty statute. As we stated in *People v. Ainsworth* (1988) 45 Cal.3d 984, 1034, "[tlhe 1978 law in effect at the time of *Davenport* directs that the jury impose the death penalty if the jury finds that aggravation *outweighs* mitigation. The 1977 statute did not contain mandatory language and that statute, applicable here,

afforded the jury a greater latitude to exercise discretion in favor of a sentence of life without possibility of parole." (Italics in original.)

3. (*Consideration of Sympathy*. Defendant's assertion that the prosecutor argued to the jury that it would be improper to consider sympathy is belied by the record. "It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience." (*Haskett I, supra*, 30 Cal.3d 841, 863; see also *People v. Robertson* (1982) 33 Cal.3d 21, 58.) Here the court instructed and repeated during deliberations (*ante*, pp. ___, ___ [typed maj. opn. pp. 14, 18]) that the jury was to consider pity, sympathy, and mercy in deciding the appropriate penalty. Defendant concedes that the prosecutor told the jury to consider sympathy. The prosecutor's further comments merely urged that the facts of this case did not warrant sympathy. We find no misconduct.

4. *Preference for Death Penalty Under the Law and That "Justice" Demands the Death Sentence*. Defendant does not cite to the record regarding these alleged comments. Independent review of the record reveals nothing. At one point we note that the prosecutor referred to the voir dire and told the jurors they had indicated that "if the evidence under the law indicated that the proper verdict was a death verdict, you could return that death verdict, because that, under a fair, impartial consideration of all the evidence, was the proper verdict." Shortly thereafter, during a recess of argument and outside the presence of the jury, the court stated to counsel: "I did notice Mr. Marin [the prosecutor] used the statement, something something, 'and the law indicates death is proper.' The

law has no preference for one penalty or another. I would admonish you not to go back into that." Despite the court's comment, defendant has not persuaded me that the prosecutor made an improper comment, if indeed the court was referring to the statements of the prosecutor which we quote above. Those statements merely reminded the jurors that they had said they could return a death verdict if it was found to be the proper verdict. In any event, the alleged remarks were not objected to, and, if made, would have been capable of correction by timely admonition. (See *Green, supra,* 27 Cal.3d at p. 27.)

5. *Unwarranted Personal Attacks on Defense Counsel.* Defendant points to 22 comments that, it is argued, made defense counsel, not the evidence, the focus of the prosecutor's argument. For example, the prosecutor allegedly told the jury that defense counsel did not want jurors to follow the law, that defense counsel was "dishonest," "tricky," and blasphemous (asking them how Jesus Christ would vote if he were on the jury), that defense counsel misled the jury as to the facts and the law, and that he was in general disreputable. The argument by both counsel was somewhat acrimonious – defense counsel called the prosecutor the representative of death" – and the court cautioned counsel on several occasions. We are convinced, however, that none of the incidents, singly or in combination, was of such significance as to constitute prejudicial error.

6. *Argument That Jurors Who Voted for Life Would Be "Ineligible" Jurors and That Jurors Should Not "Hold Out,"* Again with no reference to the record, defendant claims that the prosecutor told jurors that they were chosen because they wouldn't "find it difficult" to impose death;

he also asserts that the prosecutor told the jurors to conform, not to "hold out," and not to look "carefully" at circumstantial evidence. The alleged comments are not pinpointed in the record, were not objected to, and, if made, were capable of correction by timely admonition. (*Green, supra,* 27 Cal.3d at p. 27.)

7. *Inflammatory Comments, and Appeals to Passion and Prejudice of the Jurors.* Defendant labels inflammatory the invitation of the prosecutor to the jurors to imagine themselves as the victims. The same argument was made and answered after the first penalty trial. (*Haskett I, supra,* 30 Cal.3d at p. 863.) We there concluded that "because of its obvious relevance to a moral assessment of the crime, the prosecution's invitation to the jurors to project themselves into the role of the surviving victim in this case was insufficiently inflammatory to justify reversal. Although the argument no doubt evoked an emotional response, that reaction is attributable more to the gruesome nature of the crime than to the perspective from which it was portrayed." (*Id.* at p. 864.)

Defendant also urges that the prosecutor's descriptions of defendant were designed to elicit hostile emotions. For example, " . . . how many of you can really satisfy yourself with coming up with words that sufficiently and fairly describe this man that sits before us now so calm and so cool?"; "Any reasonable, logical person can see what this defendant is, what kind of a person he is. I said I wasn't going to call him any names. You can." There was no objection to any of the above comments, each of which could easily have been muted by admonition. Further, insofar as defendant complains of the reference to defendant's demeanor, there was no

error. Reference to courtroom demeanor is not improper during the penalty phase. (*People v. Jackson, supra,* 49 Cal.3d 1170, 1206.)

Nor is there any merit to defendant's contention that the prosecutor committed misconduct in showing the jury photographs of the victims which had been properly admitted into evidence. In sum, we find no prejudicial error in the conduct of the prosecutor in these regards.

8. *Exploitation of Erroneous Admission of Psychiatrist's Testimony.* We have concluded (*ante,* p. ___ [typed maj. opn. p. 49]) that Dr. Stahlberg's testimony was not erroneously admitted. Accordingly, there was no misconduct in the reference to the doctor's testimony.

9. *Misstatement of Law Concerning Two Reasonable Interpretations of the Evidence.* Regarding the rule that applies when there are two reasonable interpretations of circumstantial evidence (i.e., must accept that most favorable to defendant), the prosecutor stated: "You have two different stories. A jury might think this story showing guilt is reasonable, and the other showing the alibi is reasonable. Then I guess we have to take the one that shows the innocence. We have to vote innocent. That is not true at all, because you can see you have to decide what the true facts are at first." From these comments, defendant speculates that the jury could have believed that the burden of proof was on the defense, rather than the prosecution.

As the People point out, defendant overstates his case. The prosecutor merely noted that the jury serves as the trier of fact; there was no mention of the burden of proof. As to that, the jury had been properly instructed

by the court. Further, any potentially misleading aspect of the prosecutor's comments could have been corrected by the court on objection by defendant. We find no error.

D. Effectiveness of Counsel.

Defendant bears the burden of proving ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) To establish constitutionally inadequate representation, the defendant must show that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's representation subjected the defense to prejudice, i.e., there is a reasonable probability that but for counsel's failings the result would have been more favorable. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218; see also *People v. Fosselman* (1983) 33 Cal.3d 572; *Strickland v. Washington* (1984) 466 U.S. 668, 687-696.) When a defendant makes an ineffectiveness claim on appeal, the appellate court must look to see if the record contains any explanation for the challenged aspects of representation. If the record sheds no light on why counsel acted or failed to act in the manner challenged, "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation" (*People v. Pope, supra,* 23 Cal.3d at p. 426), the contention must be rejected. On this record, as we illustrate hereafter, defendant has not met his burden to establish the ineffectiveness of trial counsel.

1. *Testimony of Mrs. Toni R.* Defendant faults defense counsel for failing to object to Mrs. Toni R.'s testimony that, during his attack on her, defendant told her to "shut

up, all the other girls had done what he wanted and he would hurt me if I didn't do what he wanted." Defense counsel had unsuccessfully attempted to exclude all evidence of the attack on Mrs. Toni R. There is no indication in the record that defense counsel should have anticipated the remark. Once the remark had been made, counsel may have decided not to emphasize the remark by objecting to it. The reason for counsel's omission does not appear in the record. We may therefore reject defendant's claim of ineffective counsel out of hand. (*People v. Pope, supra,* 23 Cal.3d at p. 426.) However, to preclude the relitigation of this issue in a habeas corpus petition we discuss the merits.

Defendant relies on *People v. Robertson, supra,* 33 Cal.3d 21, where we found prejudicial error in the admission of a statement implying the commission of "other crimes." Defendant's implied admissions to Mrs. Toni R. that he had committed sexual attacks on "other girls" are somewhat similar to the admissions of the defendant to a witness (Kim P.) in *Robertson* that "he had killed two others." The witness, whose testimony was admitted at the guilt phase only as probative of Robertson's state of mind at the time of the charged killings, testified to sexual assaults against her as well as to Robertson's statement that he had "killed two others." We held that trial counsel failed to render reasonably competent assistance at the guilt phase in not objecting to the statement; we nevertheless affirmed because the evidence against Robertson was overwhelming as to guilt and special circumstances. (*id.* at pp. 40-42.) We reversed the penalty verdict, however, for failure to give a reasonable doubt instruction with respect to the crimes committed against

Kim P. as well as possible additional crimes implied in the statement that he had killed the "two others." (*Id.* at pp. 53-55.)

In the instant case, even if counsel's representation were deficient in failing to object to the "other girls" remark, we find no prejudice to defendant. The trial court followed the procedures prescribed in *Robertson* (*supra,* 33 Cal.3d at p. 55, fn. 19) to avoid potential confusion over which "other crimes" the prosecution was relying on as aggravating circumstances. The instruction here related specifically to the attacks on Mrs. Gwendolyn R. and Mrs. Toni R. The jury was told to consider those crimes only if they found beyond a reasonable doubt that defendant committed them. The jury was also told not to consider "any evidence of any other criminal acts or activity as an aggravating circumstance." The "other girls" remark, in our view, was effectively excluded from consideration in the penalty determination by the court's explicit instruction. Thus, the failure to object did not constitute ineffectiveness of counsel.

2. *Reliance on Alibi Defense.* Defendant faults defense counsel for relying on an alibi defense and for presenting any evidence thereon at the second penalty trial. This decision was clearly a tactical choice and not subject to second-guessing by this court. (*People v. Ledesma, supra,* 43 Cal.3d at p 216.) The challenge to counsel on the more specific grounds that counsel should have sought a ruling on the admissibility of Dr. Stalberg's testimony *before* committing himself to a theory of mitigation (alibi) that was incompatible with the confession is only a more oblique attack on the use of the alibi theory of defense in the first place. The reason for counsel's omission does not

appear in the record on appeal; we must therefore reject the contention that counsel was ineffective, in this regard. (*Id.*, at p. 218.)

3. *Evidence of Low Intelligence.* The record does not reveal why defense counsel did not elicit from Dr. Stalberg that defendant had "low intelligence," information to which he had testified in the first penalty trial. The decision not to question the doctor on any of the mental state evidence was entirely consistent with defense counsel's request, granted by the trial court, that Dr. Stalberg not testify to "any psychiatric evidence." The reason for this tactical decision is not of record, however, and cannot serve as a basis for reversal on adequacy of counsel grounds.

4. *Mistrial Instruction.* Defendant next contends that counsel should have objected to the court's instruction that the result of a hung jury would be a mistrial. Our conclusion, that there was no error in failing to tell the jury that defendant would be sentenced to life if the jury was unable to agree on a verdict, disposes of this contention. (See *ante*, pp. ___-___ [typed maj. opn. pp). 40-41].)

5. *Prosecutorial Misconduct.* The only objection at trial to the prosecutor's closing argument was sustained by the trial court. (See *ante*, pp. ___-___ [typed maj. opn. p. 49-50].) When the prosecutor responded to the good-character witnesses presented by the defense with the rhetorical question, "So, do you think that I could bring in evidence of someone to say, well, no, he's a bad guy?," defense counsel objected on grounds that the prosecutor was misstating the law and that "He can impeach any witnesses." The court sustained the objection.

Defendant now suggests that counsel should have objected to comments made immediately thereafter by the prosecutor. The prosecutor agreed that he could impeach a witness. He noted, however, that calling a witness to testify to defendant's bad character does not necessarily impeach the good-character witness, for a person can have a good reputation with one person and bad reputation with another. Defense counsel urges that the prosecutor's comments suggested he had bad-character witnesses that he did not call. Even if it is conceded that the prosecutor's comments can be interpreted as defendant suggests, on this record we cannot say that defendant was prejudiced by counsel's failure to object. (*Strickland v. Washington, supra,* 466 U.S. at pp. 691-692.)

CONCLUSION

For the foregoing reasons, the judgment is affirmed.

PANELLI, J.

WE CONCUR:

LUCAS, C.J.
EAGLESON, J.
ARABIAN, J.

PEOPLE v. HASKETT

S004694 [Crim. 24649]

DISSENTING OPINION BY MOSK, J.

I dissent.

As I shall explain, the judgment of death should be reversed because of prejudicial *Skipper* error. (*Skipper v. South Carolina* (1986) 476 U.S. 1.) Through certain of its instructions and statements in the course of deliberations, the court improperly precluded the jury from considering in mitigation evidence bearing on defendant's possible insanity or mental or emotional disturbance at the time of the offenses. On this record, the error cannot be deemed harmless.

"[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment, [citation], requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

"This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428

U.S. 280, 304-305 (lead opn. of Stewart, Powell, and Stevens, JJ.).)

To guarantee that capital sentencing decisions are as individualized and reliable as the Constitution demands, the Eighth Amendment requires that the defendant may not be barred from introducing any relevant mitigating evidence. (*Skipper v. South Carolina, supra,* 476 U.S. at pp. 4-8; see *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112-116; *Lockett v. Ohio* (1978) 438 U.S. 586, 597-605 (plur. opn. by Burger, C. J.); *Bell v. Ohio* (1978) 438 U.S. 637, 642 (plur. opn. by Burger, C. J.).)

It follows that the Eighth Amendment also requires that a jury and its individual members (*McKoy v. North Carolina* (1990) ___ U.S. ___, ___-___ [110 S.Ct. 1227, 1231-1234]) "may not . . . be precluded from considering 'any relevant mitigating evidence.' " (*Skipper v. South Carolina, supra,* 476 U.S. at p. 4 (quoting *Eddings v. Oklahoma, supra,* 455 U.S. at p. 114); accord, *McKoy v. North Carolina, supra,* ___ U.S. at pp. ___-___ [110 S.Ct. at pp. 1231-1234]; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 394, 398-399; *Mills v. Maryland* (1988) 486 U.S. 367, 374-375.)

Such evidence, of course, includes information relating to insanity and mental or emotional disturbance. (See, e.g., *Eddings v. Oklahoma, supra,* 455 U.S. at p. 116 [holding that a defendant's "mental and emotional development" at the time of the offense is material in capital sentencing].)[1]

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[1] The majority imply that "relevant mitigating evidence" for purposes of the Eighth Amendment includes mental or

(Continued on following page)

Therefore, when any barrier, whether statutory, instructional, evidentiary, or otherwise (see *Mills v. Maryland, supra,* 486 U.S. at pp. 374-375), precludes a jury or any of its members (*McKoy v. North Carolina, supra,* ___ U.S. at pp. ___-___ [110 S.Ct. at pp. 1231-1234]) from considering relevant mitigating evidence, there occurs federal constitutional error, which is commonly referred to as "*Skipper* error." (See generally *Skipper v. South Carolina, supra,* 476 U.S. at pp. 4-8; *Hitchcock v. Dugger, supra,* 481 U.S. at pp. 394, 398-399; *Mills v. Maryland, supra,* 486 U.S. at pp. 374-375; *McKoy v. North Carolina, supra,* ___ U.S. at pp. ___-___ [110 S.Ct. at pp. 1231-1234].)

When the claimed barrier to the jury's consideration of relevant mitigating evidence is an instruction, the crucial question for determining error "is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of" such evidence. (*Boyde v. California* (1990) ___ U.S. ___, ___ [110 S.Ct. 1190, 1198].)

(Continued from previous page)

emotional disturbance *but not insanity.* If they were correct, evidence that merely reduces culpability would be allowed on the crucial Eighth Amendment issue of " 'personal responsibility and moral guilt' " (*People v. Marshall* (1990) 50 Cal.3d 907, 938), but evidence that totally negates culpability would be barred – surely an untenable result. Contrary to their suggestion, in *Lockett v. Ohio, supra,* 438 U.S. 586, and *Bell v. Ohio, supra,* 438 U.S. 637, the United States Supreme Court did not validate a statute excluding evidence of insanity. Rather, in those decisions the court *invalidated* a statute even though it *included* evidence of mental states *less than insanity.*

To conclude that *Skipper* error has in fact occurred, however, does not end the analysis. This error is not automatically reversible, but is subject to harmless-error review under the test of *Chapman v. California* (1967) 386 U.S. 18 (hereafter sometimes *Chapman*). (E.g., *People v. Lucero* (1988) 44 Cal.3d 1006, 1031-1032.)

Under *Chapman*, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (386 U.S. at p. 24.) The "burden of proof" as to prejudice rests on the government. "Certainly error, constitutional error, . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless. . . . [T]he beneficiary of a constitutional error [is required] to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Ibid.*) When the constitutional error occurred at the penalty phase of a capital trial, the court must proceed with special caution. (See *Satterwhite v. Texas* (1988) 486 U.S. 249, 258 [stating that "the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer"].) In such a situation, the "burden of proof" must be deemed very heavy indeed.

I turn to the case at bar. The themes that the People and defendant chose to play throughout the penalty phase were "lingering doubt" and mercy: the People's position was that defendant was indeed the perpetrator of the crimes of which he had been convicted, and that he was undeserving of mercy; defendant's position was the opposite. These themes did *not* include whether or not

defendant was insane or mentally or emotionally disturbed.

It became evident from their questions and comments to the court during deliberations that the jury entertained doubts as to whether there was evidence bearing on defendant's possible insanity or mental or emotional disturbance and, more important, whether insanity or mental or emotional disturbance was a circumstance they could consider in mitigation of the penalty of death. The source of the difficulty is apparent.

There was indeed evidence in the record that could support an inference that defendant was insane or mentally or emotionally disturbed: defendant had always loved children and treated them kindly; nevertheless, he brutally and repeatedly stabbed to death his very own nephews, who were four and eleven years of age.

But as noted, neither the People nor defendant had played the theme of insanity or mental or emotional disturbance. They had chosen "lingering doubt" and mercy instead.

Moreover, the court had not clearly instructed on insanity or mental or emotional disturbance. One penalty factor, it is true, covered "*extreme* mental or emotional disturbance." (Italics added.) But it was uncertain whether this factor embraced insanity, or even mental or emotional disturbance that was not "extreme." Another penalty factor covered "Any . . . circumstance *which extenuates the gravity of the crime* . . . and any . . . aspect of the defendant's character or record *that the defendant offers as a basis for [a] sentence less than death.*" (Italics added.) But

it was uncertain whether this factor encompassed insanity or mental or emotional disturbance: although such conditions could perhaps be said to "extenuate[] the gravity of the crime," none was "offer[ed]" by defendant "as a basis for [a] sentence less than death."

On the first day of deliberations, the jury directed no questions or comments to the court.

On the second day, the jury asked about the phrase "special circumstances," and the court responded that it referred to the multiple murder of defendant's nephews.

On the third day, the jury asked a number of questions, including the following: "Do we have to have expert testimony as to mental or emotional disturbance to consider it as a mitigating circumstance?" In response, the court instructed: "Mental or emotional disturbance is not always necessarily proved by the testimony of an expert such as a psychiatrist. It may be proved by any other testimonial evidence but not by speculation." (Paragraphing omitted.) With apparent reference to the foregoing, one of the jurors stated: "On one question, without going into detail, you answered it, but I don't think it answers it." The court replied: "All I can suggest is that you return to the jury room and be very specific about the unanswered problem, but I am not allowed to discuss anything without consulting the attorneys."

Later that day, the jury asked further questions. The first was: "Do we have the option of concluding from the nature of the crimes committed that Randy Haskett may be/is mentally or emotionally disturbed based on the *testimony regarding* the nature of the crimes?" (Emphasis in original.) The court responded: "I do not have an

answer this time to Question Number One. I will have an answer tomorrow morning." (Paragraphing omitted.)

The next morning, on the fourth day, the court stated to the jury: "In relation to Question Number One, Ladies and Gentlemen, the attorneys and I have consulted and this is our request: Will you please expand and clarify as much as possible what you have in mind so that we can understand it a little better and answer your question. The minute I receive that, I will be in touch with the attorneys, and we will try to answer it for you." (Paragraphing omitted.)

Later that morning, the jury directed the following note to the court: "We the jury on the Case of Randy Haskett can not reach a unamious [*sic*] decision." In open court, in the presence of the jury, the court stated: "Mr. Foreman, you sent to the court a note which in effect indicates that the jury is hopelessly deadlocked. If the court were to ask you to continue deliberations, do you think there is any reasonable probability that you might ever arrive at a verdict?" (Paragraphing omitted.) The foreman answered: "No, Your Honor. I don't think at this time that we could." The court then asked: "Is there anything at all that the court could do further to assist the jury in arriving at any kind of a verdict?" The foreman answered: "Yes." The court stated: "If there is, in my opinion, I believe it should be written down and submitted to the court."

That afternoon, the jury directed another note to the court. Contained therein were, among other things, a statement, a question, and a request.

The jury's statement was: "[S]ome of us feel there is not a williness [*sic*] among some of the jurors to discuss the case and to go by the evidence that has been presented. [T]hey are trying to speculate on evidence not presented. [T]here is a doubt in their mind about the sanity of Randy Haskett which has not been presented in this case."

Next, the jury's question – which was evidently the "expansion" or "clarification" of the previous day's "Question Number One" sought by the court – was as follows: "[T]here was to be a question asked of the judge whether we could consider insanity based on the act of repeated stabbings of the victims."

In response, the court instructed: "The defendant is presumed to be sane. The jurors cannot consider insanity as a mitigating factor." The court had earlier informed counsel of this instruction outside the presence of the jury. One of defendant's attorneys had asked, "Would the court consider with respect to whether the jury can consider insanity or not, amending that to indicate, though they can't consider insanity, they can consider the mental state of the defendant as reflected by any of the evidence in determining which penalty to give?" The court had responded, "No."

Finally, the jury's request was: "All 12 jurors need to be further clarified on their obligation as jurors. The instructions as read so far are not considered by the majority to be sufficient. We need to have clarified whether we may use something as a mitigating factor if it has not been proven or substantiated by evidence presented. Can we ignore testimony of witnesses if there is

substantial corroborating evidence to that [sic] witnesses' testimony?"

In response, the court instructed: "It is the duty of the jurors to discuss the evidence and not speculate on evidence not presented. Each juror should decide the case for him[self] or herself after a discussion of the evidence and instructions with the other jurors. You may consider pity, sympathy, and mercy in deciding the appropriate penalty. However, you must not be governed by mere conjecture, prejudice or public opinion." (Paragraphing omitted.)

On the morning of the sixth day, the jury directed yet another note to the court: "We have (1) juror who continues to use insanity or mental disturbance as a mitigating circumstance even though you (the judge) have said, 'we can't use this.' He refuses to discuss the case anymore. Is there anything you can do, being he is disregarding your ruling completely?"

That same morning, the court commented on the note outside the presence of the jury: "The court feels that on the basis of this, that there should be a hearing as to whether or not the juror involved is unable to perform his or her duties so that this court will know whether or not there is good cause to discharge any particular juror."

That afternoon, the court held a hearing with the jury as a whole. It opened by reading the note referred to above. It then asked the jurors if any of them could not or would not consider the evidence and follow the instructions. When no one responded, over defense objection it asked the foreman to identify the juror who was the

subject of the inquiry. He named Roy Lizana. It then excused all the jurors except Lizana.

At a hearing with Juror Lizana, the court stated: "What I am obligated to go into is the subject matter of the note which indicates that you were considering something as a mitigating factor that I indicated there was no evidence of." The court elaborated: "The only problem that I have to find out at this time is are you disregarding the court's instruction that was given to you that Mr. Haskett is presumed sane and that this may not be considered as a mitigating factor." Lizana denied he was disregarding the instruction, albeit somewhat ambiguously. The court asked: "Then, as far as you are concerned, are you following the court's instruction on this particular point?" He answered: "Yes, I am." The court asked: "Then it's your assurance that you are not using this as a mitigating circumstance and you are following the court's instructions as far as whatever conclusions you have come to; is that correct?" He answered: "I figure if he was, we wouldn't be sitting in here now. If he was judged insane, we wouldn't have had to come in. Leave it at that." (Paragraphing omitted.) The hearing closed.

Later that afternoon, the court reopened the hearing with Juror Lizana "just to be sure that I understand you." It asked: "Do you use insanity or mental disturbance as a mitigating circumstance?" He answered, "No, Ma'am." The court summoned the rest of the jurors into the courtroom and announced: "Ladies and Gentlemen, the court finds there has been no failure on the part of any juror to follow the court's instructions, and I will ask you to continue your deliberations."

On the seventh day, the jury returned a verdict of death.

As stated above, *Skipper* error occurred in this case: there is a reasonable likelihood that the jury applied the court's mid-deliberation instructions and statements in such a way as to prevent itself from considering in mitigation evidence bearing on defendant's possible insanity or mental or emotional disturbance.

It clearly appears to have been the court's intent to preclude the jury from considering evidence of insanity or mental or emotional disturbance.

As noted, the court refused defense counsel's request to "amend" its instruction on the conclusive presumption of sanity and the immateriality of insanity "to indicate, though [the jurors] can't consider insanity, they can consider the mental state of the defendant as reflected by any of the evidence. . . . "

That instruction, however, was contrary to federal constitutional law. As noted, under the Eighth Amendment a jury and its individual members (*McKoy v. North Carolina, supra,* ___ U.S. at pp. ___-___ [110 S.Ct. at pp. 1231-1234]) "may not . . . be precluded from considering 'any relevant mitigating evidence.' " (*Skipper v. South Carolina, supra,* 476 U.S. at p. 4 (quoting *Eddings v. Oklahoma, supra,* 455 U.S. at p. 114); accord, *McKoy v. North Carolina, supra,* ___ U.S. at pp. ___-___ [110 S.Ct. at pp. 1231-1234]; *Hitchcock v. Dugger, supra,* 481 U.S. at pp. 394, 398-399; *Mills v. Maryland, supra,* 486 U.S. at pp. 374-375). Such evidence includes information relating to insanity. (See, e.g., *Eddings v. Oklahoma, supra,* 455 U.S. at p. 116 [holding that a defendant's "mental and emotional development"

at the time of the offense is material in capital sentencing].)

The instruction was also contrary to state statutory law. Under former Penal Code section 190.3 (Stats. 1.977, ch. 316, § 11, pp. 1258-1260), which is applicable here, the jury may not be precluded from considering, as a circumstance in mitigation, "Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the affects [*sic*] of intoxication." It follows from the very words of the provision that the jurors may not be barred from taking insanity into account: by definition, a defendant who was insane possessed "capacity" that was "impaired as a result of mental disease. . . . "[2]

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[2] The majority argue that mental or emotional disturbance was included in the words of former Penal Code section 190.3 quoted above, but not insanity. They are unpersuasive. Contrary to their implication, the fact that impaired capacity *less than insanity* was relevant to the issue of mitigation under the 1977 death penalty law simply does not support an inference that impaired capacity *amounting to insanity* was otherwise. Of course, for purposes here "mitigation" embraces that which reduces the capital defendant's personal moral culpability. (See former Pen. Code, § 190-3.) To be sure, impairment less than insanity extenuates responsibility to some degree. But impairment amounting to insanity extenuates responsibility further still – and indeed removes it altogether. If the majority were correct, evidence that merely reduces culpability would be allowed, but evidence that totally negates culpability would be barred – surely an untenable result. (Compare fn. 1, *ante*.)

Also, under former Penal Code section 190.3, the jury may not be precluded from considering, as a circumstance in mitigation, any "lingering doubt" they might have about the defendant's guilt of the capital offense. The court held as much in *People v. Terry* (1964) 61 Cal.2d 137, 145-147, with regard to former Penal Code section 190.1 (Stats. 1959, ch. 738, § 1, pp. 2727-2728), which is relevantly similar to the provision in question. Neither reason nor authority supports the conclusion that the basis of such "lingering doubt" is of any consequence whatever. It follows that the jury may not be barred from taking into account any "lingering doubt" about guilt based on any factor – including insanity.[3]

Further, when the jury clearly manifested their erroneous belief that they could not consider insanity or mental or emotional disturbance – "We have (1) juror who continues to use *insanity of mental disturbance* as a mitigating circumstance *even though you (the judge) have said, 'we can't use this'* " (italics added) – the court did nothing whatever to correct their misunderstanding.

Finally, in the hearings with the jury as a whole and with Juror Lizana alone, the court effectively instructed that insanity or mental or emotional disturbance could

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[3] The majority attempt to avoid the holding of *People v. Terry, supra,* 61 Cal.2d 137, but are unsuccessful. To be sure, *Terry* did indeed conclude that the exclusion of certain evidence to support a "lingering doubt" of the defendant's guilt of the capital offense was erroneous. But it did so because it first concluded that a defendant's possible innocence of that offense is a mitigating circumstance that the jury may properly consider. (*Id.* at pp. 145-147.)

not be considered as a mitigating circumstance. For example, it told Lizana in substance that insanity or mental or emotional disturbance was "a mitigating factor that I indicated there was no evidence of." And it suggested to him that the appropriate response to its question, "Do you use *insanity or mental disturbance* as a mitigating circumstance?" (italics added), was negative.

But whether the court intended to preclude the jury from considering evidence of insanity or mental or emotional disturbance is not dispositive. What is crucial is whether there is a reasonable likelihood that the jury or any of its members was in fact precluded. The answer must be affirmative.

Clear proof that the jury or at least one of its members was precluded from considering evidence of insanity or mental or emotional disturbance is found in the note: We have (1) juror who continues to use *insanity or mental disturbance* as a mitigating circumstance *even though you (the judge) have said, 'we can't use this.'* " (Italics added.)

Proof clearer still is found in the record of the reopened hearing with Juror Lizana. As noted, the court asked, "Do you use *insanity or mental disturbance* as a mitigating circumstance?" (Italics added.) Lizana answered, "No, Ma'am."

The majority conclude that *Skipper* error did not in fact occur. They claim in substance that insanity is not a material issue at the penalty phase of a capital trial. But as shown, the point founders on the Eighth Amendment as well as former Penal Code section 190.3. They also claim that "insanity" was used and understood by both the court and the jury in its technical legal sense, and not

somewhat loosely as denoting mental or emotional disturbance of any degree. But in light of the record set out above – *including the fact that the judge never instructed the jurors on insanity in its technical legal sense* – the assertion is untenable. They then claim that the issue of insanity or mental or emotional disturbance was not before the jury. To be sure, the matter was not raised by the parties. But it was indeed raised – by the jurors themselves. They finally claim that the question with which the jury was concerned during deliberations was not whether they could consider insanity or mental or emotional disturbance as a mitigating circumstance, but merely whether they could find any evidence in support. But here again, in light of the record set out above, the assertion is untenable.

As also stated, the *Skipper* error in this case cannot be deemed harmless. The People do not even attempt to carry their very heavy burden of proving harmlessness beyond a reasonable doubt. Any attempt, however, would have been unsuccessful. The question of penalty must be considered close. The jury's deliberations on the issue of insanity or mental or emotional disturbance were crucial, difficult, and long: the point is proved by the questions and comments quoted above, and by the fact that the deliberations filled almost 33 hours over 7 days. To be sure, the circumstances of the crimes of which defendant was convicted, together with his prior violent criminal activity, weighed in favor of death. But defendant's possible insanity or mental or emotional disturbance -- which is strongly suggested by the fact that although he had always loved children and treated them kindly, he nevertheless brutally and repeatedly stabbed to

death his very own nephews – weighed in favor of life. On this record, I am not "able to declare a belief that [the *Skipper* error] was harmless beyond a reasonable doubt." (*Chapman v. California, supra,* 386 U.S. at p. 24.)

Because of the result I reach, I need not proceed further in my analysis. One additional point, however, must be made, and made forcefully. The trial judge's examination of one juror, Lizana, was egregiously improper, and calls for the strongest disapproval. As the record set out above establishes, the court's inquiry invaded Lizana's mental processes. Such an inquiry, however, is clearly prohibited. A juror's mental processes are sacrosanct, and may not be opened to scrutiny. (See *In re Stankewitz* (1985) 40 Cal.3d 391, 398; *People v. Guzman* (1977) 66 Cal.App.3d 549, 559 & fn. 7 (per Kaus, J.) [stating with persuasive reasoning that such an inquiry "may well" be prohibited]; see also *People v. Hedgecock* (1990) 51 Cal.3d 395, 418-419 [to similar effect].)

At oral argument the People essentially conceded as much. Subsequently, in a letter brief presented after the cause was taken under submission, the People attempted to withdraw their concession on the "authority" of *People v. Eggers* (1947) 30 Cal.2d 676. Of course, "It is axiomatic that cases are not authority for propositions not considered." (*People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.) *Eggers* simply did not consider the propriety of a court's inquiry into the mental processes of a juror.

The majority state that "the task of determining *whether* misconduct occurred" is different from "the concededly more delicate task of determining the *effect of misconduct* on jurors." (Maj. opn., *ante,* at p. ___, fn. 11

[typed maj. opn. at p. 41, fn. 11], italics in original.) But when, as here, the asserted "misconduct" comprises the juror's mental processes, the difference between the two "tasks" is of semantics and not substance. The majority also state that. "Asking a juror whether he is following the court's instructions – or using insanity as a mitigating fact, in contravention of the court's instructions – does not implicate the juror's reasoning process." (*Ibid.*, italics in original.) They are right. For *the court* to *ask* a juror such a question does not "implicate the juror's reasoning process." But for *the juror* to *answer* does.

Because of the prejudicial *Skipper* error, I would reverse the judgment of death.

MOSK, J.

I CONCUR: BROUSSARD, J.

PEOPLE V. HASKETT

S004694

DISSENTING OPINION BY KENNARD, J.

I respectfully dissent.

The trial court's responses to the questions asked by the jury during deliberations erroneously led the jury to believe that it could not consider in mitigation defendant's mental condition at the time he committed the murders. The jury's confusion is clearly demonstrated by a note in which it informed the trial court that one of its members was using defendant's mental state as a mitigating circumstance "even though you, the judge, have said we can't use it." Upon receiving this note, the court was obligated to dispel the jury's confusion on the issue. Its failure to do so was prejudicial error.

There is, of course, no question that a jury deliberating the question of penalty in a capital case must be permitted to consider the defendant's mental or emotional state as a factor in mitigation. The Eighth Amendment to the United States Constitution requires that, before determining whether to impose the death penalty, the jury consider the circumstances relating both to the character and background of the individual offender and the circumstances of the offense. (*Eddings v. Oklahoma* (1981) 455 U.S. 104, 112.) As the United States Supreme Court recently stated, "a sentencer may not be precluded from giving effect to all mitigating evidence." (*McKoy v. North Carolina* (1990) ___ U.S. ___ [110 S.Ct. 1227, 1231]; accord, *Skipper v. South Carolina* (1986) 476 U.S. 1, 4; *Mills v. Maryland* (1988) 486 U.S. 367, 374-375.)

In his penalty phase presentation in this case, defendant attempted to persuade the jury that it should have a "lingering doubt" whether he had committed the murders; he did not rely on mitigating circumstances relating to his mental state at the time of the offenses. Nevertheless, evidence was presented as part of the prosecution's case-in-chief from which the jury could have reasonably found that defendant was suffering from a mental or emotional disturbance. After raping and trying to kill his half-sister, defendant killed her children by repeatedly stabbing them with a knife. As the majority acknowledges, a jury could consider these unusual facts as evidence that defendant was suffering from a mental or emotional disturbance when he committed the offenses. (Maj. opn., *ante*, p. ___, fn. 5 [typed maj. opn., pp. 19-20, fn. 5].)

The record shows that during its lengthy deliberations the jury recognized that mental disturbance was potentially a mitigating factor in the case. To ascertain whether it would be proper to consider defendant's mental state as a mitigating circumstance, the jury asked the trial court four questions.[1] These questions, and the court's answers, were as follows:

1. (February 29, 1984.) The jury: "Do we have to have expert testimony as to mental or emotional disturbance to consider it as a mitigating circumstance?" The court: "Mental or emotional disturbance is not always necessarily proved by the testimony of an expert such as

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[1] The jury also asked a number of other questions, which are set forth in the majority opinion.

a psychiatrist. It may be proved by any other testimonial evidence but not by speculation."

2. (Two hours later.) The jury: "Do we have the option of concluding from the nature of the crimes committed that [defendant] may be/is mentally or emotionally disturbed based on the testimony regarding the nature of the crimes?" The court: "The attorneys and I have consulted and this is our request: Will you please expand and clarify as much as possible what you have in mind so that we can understand it a little better and answer your question. The minute I receive that, I will be in touch with the attorneys, and we will try to answer it for you."

3. (March 1, 1984.) The jury: "There was to be a question asked of the judge, whether we could consider insanity based on the act of repeated stabbings of the victim." The court: "The defendant is presumed to be sane. The jurors cannot consider insanity as a mitigating factor."

4. (March 5, 1984.) The jury: "We have one juror who continues to use insanity or mental disturbance as a mitigating circumstance even though you, the judge, have said we can't use it. He refuses to discuss the case any more. Is there anything you can do, being he is disregarding your ruling completely?" The court questioned this juror individually on two occasions. One of the questions asked was, "Do you use insanity or mental disturbance as a mitigating circumstance?" The juror answered, "No." The next day, the jury returned a verdict imposing the death sentence.

These questions and answers indicate that the jury was unsure whether, when the facts of the crimes constituted the only evidence presented of defendant's state of mind, the jury could properly consider in mitigation defendant's mental state at the time of the murders.

The jury's first question focused on the absence of any expert testimony about defendant's mental state, and the trial court correctly informed the jury that expert testimony was not required. But the trial court also told the jury that it could not find mental disturbance based on "speculation." This response apparently did not resolve all of the jury's uncertainties, for it then asked whether it would be proper to infer mental or emotional disturbance from "the testimony regarding the nature of the crimes." The trial court did not understand the thrust of the jury's question, and asked the jury to come back later and "clarify" it.

The majority asserts that the jury never attempted to obtain such "clarification." (Maj. opn., *ante*, p. ___ fn. 2 [typed maj. opn., pp. 10-11, fn. 2].) I disagree. In its third question, the jury asked whether it could "consider insanity based on the act of repeated stabbings of the victims." This was essentially the same as the previous question, with the word "insanity" substituted for "mental or emotional disturbance." This time, the trial court told the jury that insanity "cannot [be considered] as a mitigating factor" because defendant is "presumed sane."

The majority correctly recognizes that defendant's mental or emotional disturbance could be considered by the jury in mitigation at the penalty phase. It concludes, however, that insanity was not an issue in this case and

thus it was proper for the trial court to instruct the jury not to consider insanity in determining penalty. (Maj. opn., *ante*, pp. ___ - ___ [typed maj. opn., pp. 23-27].) For the reasons discussed in Justice Mosk's dissenting opinion, I doubt that this is so.

But assuming for argument's sake that the majority is correct, the distinction between insanity, which the jury was precluded from considering, and mental or emotional disturbance, which the jury could consider, is then of critical importance. Yet the trial court never instructed the jury on this point, and the jury's questions reveal that it did not draw such a distinction. As with the first two questions set forth above, the purpose of the third question was to determine whether, based solely on the facts of the offense (as the jury put it, "based on the act of repeated stabbings of the victim"), the jury could infer that defendant was mentally or emotionally disturbed and could consider such disturbance as a mitigating circumstance. From the trial court's answer, a reasonable juror would conclude, erroneously, that it could not do so.

Any doubt in this regard is laid to rest by the fourth question, in which a majority of the jury (apparently 11 of the 12) complained that 1 juror *"continues to use insanity or mental disturbance as a mitigating circumstance even though you, the judge, have said we can't use it."* This communication is significant for two reasons. First, it shows that the jury considered insanity and mental disturbance to be essentially synonymous terms. Second, and most important, it clearly demonstrates that the jury erroneously believed that mental disturbance could not be considered as a mitigating circumstance.

Upon receiving this communication from the jury, it was incumbent upon the trial court to undo the consequences of its earlier instructions and to correct the jury's misconception. Even if the court's original instructions had been correct, once it became aware that the jury was confused as to the law it had a duty to correct the confusion. " 'Just as the law imposes a *sua sponte* obligation to instruct on certain principles of law in the first place (those rules openly and closely connected with the case) so does it impose on the judge a duty to reinstruct on the point if it becomes apparent to [the judge] that the jury may be confused on the law.' " (*People v. Vela* (1985) 172 Cal.App.3d 237, 241, quoting *People v. Valenzuela* (1977) 76 Cal.App.3d 218, 221.) Here, the jury's communication showed that it had seriously gone astray; the trial court, therefore, was compelled to clarify the matter.

But, far from correcting the jury's misimpression, the trial court's actions had precisely the opposite effect; the court improperly reinforced the notion that the jury could not consider mental disturbance. The court proceeded to question the recalcitrant juror, and specifically asked him whether he was considering insanity or mental disturbance in mitigation. This question hammered home to that juror that the other jurors had correctly interpreted the trial court's instructions, and that the jury could not consider mental disturbance in any form as a mitigating circumstance.

The majority concludes that the jury was not confused. It asserts that "what divided the jurors was not whether they could consider defendant's mental state as a mitigating factor but rather whether there was any evidence in the record to support that mitigating factor."

(Maj. opn., *ante*, p. ___ [typed maj. opn., pp. 28-29].) This analysis is inconsistent with the fourth question set forth above. If the jury was merely involved in a dispute about the sufficiency of the evidence, why did a majority of jurors complain that one juror was refusing to follow the trial court's instructions? The conclusion is inescapable that a majority of the jurors believed the court had instructed them not to consider defendant's mental state as a mitigating circumstance.

The error may not be deemed harmless. "Where original instructions are inadequate, and the jury asks questions indicating their confusion and need for further explanation, failure to give proper additional instructions is usually reversible error. (7 Witkin, Cal. Procedure, [(3d ed. 1985)] Trial, § 305, p. 303.)." (*Sesler v. Ghumman* (1990) 219 Cal.App.3d 218, 227.) Here the court's failure to give additional instructions prevented the jury from considering mitigating evidence presented at the penalty phase, an error of constitutional dimension. (*Skipper v. South Carolina, supra*, 476 U.S. 1.) The jury's questions demonstrate that it was giving the question of mental disturbance careful consideration.[2] Under these circumstances, it appears "reasonably likely" that the error "may have

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[2] The law under which this case was tried provided that if the jury had been unable to reach a verdict, retrial would have been barred, and a sentence of life without possibility of parole would have been imposed. (Former Pen. Code, § 190.4, added by Stats. 1977, ch. 316, § 12, p. 1260.) Thus, even if only one juror would have found the evidence of mental disturbance compelling, the death sentence could not have been imposed.

affected the jury's decision to impose the death sentence." (476 U.S. at p. 8.)

I would reverse the judgment of death.

KENNARD, J.

I CONCUR:

BROUSSARD, J.

PEOPLE v. RANDY HASKETT

S004694

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